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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

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AMERICAN STATE REPORTS.

VOL. XXXI.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

GONZALES v. CITY OF GALVESTON.

[84 TEXAS, 2.]

NEGLECT OF CITY — PROXIMATE CAUSE. — When it is negligence on the part of a city, at the time of an injury, to have failed to remove a lumber-pile from a street, and this failure and the act of a drayman both concur in causing the injury, without contributory negligence on the part of the party injured, the city is liable, no matter whether the act of the drayman was negligent or not.

NEGLECT OF CITY — PROXIMATE CAUSE — QUESTION FOR JURY. — If the presence of a lumber-pile in a street at the time of an accident is chargeable to the negligence of a city, and such negligence, together with the act of a drayman, causes an injury to a person guilty of no contributory negligence, the negligence of the city is part of the proximate cause, for which it is liable. These issues should be determined by the jury from all the facts, taking into consideration the powers, duties, and rights of the city under its charter and ordinances.

NEGLECT OF CITY — PROXIMATE CAUSE. — When it is negligence on the part of a city to fail to remove a lumber-pile from a street, the fact that the lumber was carefully and safely piled is immaterial, provided its being there is a concurring proximate cause of the injury sued for.

NEGLECT — THE PROXIMATE CAUSE is not necessarily the last act or nearest act to the injury, but it may be such an act, wanting in ordinary care, as actively aids in producing the injury, as a direct and existing cause. It need not be the sole cause, but must be a concurring cause, such as might reasonably have been contemplated as involving the result under the attending circumstances.

E. D. Casin, and Hume and Kleberg, for the appellant.

W. Rhodes, for the appellee.

COLLARD, J., Section A. This suit was brought by Pauline V. Gonzales, the appellant, a minor, by her next friend, Andeses Gonzales, against the city of Galveston, to recover damages for injuries received by her, caused by the falling of

lumber from a pile of lumber alleged to have been unlawfully placed in Twenty-seventh Street, and allowed to remain there, the city having notice of the fact. It seems that lumber had been piled in the street—carefully piled—by A. J. Perkins & Co., lumber dealers; and such a pile of lumber had been there in the street for some years, a part of the street being used by Perkins & Co. as a lumber-yard. On the thirteenth day of May, 1890, a drayman, Peter Peterson, was hauling lumber loaded diagonally on his dray, and had occasion to turn into the street from an alley and to pass by the pile of lumber in the street. In doing so, and he says driving carefully, his load came in contact with the pile of lumber, and knocked off some heavy pieces on the opposite side from him. The plaintiff, Pauline Gonzales, and another child, Maggie O'Reagan, were on the opposite side of the lumber-pile, out of sight of the drayman. The falling lumber struck the children, killing Maggie O'Reagan immediately, and severely injuring the plaintiff. The petition is not objectionable, showing that but for the unlawful piling of the lumber in the street and allowing it to remain there, which fact the city knew, the accident would not have occurred. The defense set up was, that the lumber was carefully and safely piled in the street by A. J. Perkins & Co., near the west sidewalk, so as to leave at the locality an open and unobstructed space for travel in the usual mode, and that while the children were playing near the pile of lumber, between it and the west sidewalk, the drayman carelessly drove his load of lumber against the same, knocking off some of the pile, and so caused the injury, without any fault on the part of defendant, and that but for the careless act of the drayman, the injury would not have occurred. It is also set up by defendant that the injury was not caused by any careless piling of the lumber. There was evidence tending to establish the facts set up in defense.

The court instructed the jury as follows: "The proximate cause of plaintiff's injury was not the pile of lumber, but was the act of the dray-load of lumber being driven against the pile of lumber, which, although on the street, was properly piled, and therefore the law will not, in such case, cause any liability on the part of the city, and you should find a verdict for the defendant."

Plaintiff's case is based upon the theory that the placing of the lumber in the street was unlawful; that the city authorities knew it was there, and wrongfully and negligently suf-

ferred it to remain there as an obstruction to travel, its charter giving it full control over its streets, alleys, and public ways, and its ordinances authorizing and requiring it to remove all obstructions therefrom. The city's liability is based upon its negligence in failing to remove the obstruction. The court refused instructions asked by plaintiff presenting this view of the case. Error is assigned to the charge given and to the rejection of the charges asked.

The first question to be determined by the jury was, whether the city was negligent in failing to cause the obstruction to be removed from the street; and did the city have notice of the same? or was it charged with notice from the length of time it was there, or from any other circumstance? It is contended by appellee that if this fact be found in the affirmative, yet the injury was caused by the act of an intermediate agency, by the act of the drayman as the proximate cause, and the city would not be liable. We do not think this is the principle governing the case. If it should be held that it was negligence on the part of defendant at the time of the injury to have failed to remove the obstruction from the street, and this failure and the act of the drayman, both concurring, caused the injury, the city would be liable. This would be true whether the act of the drayman was negligent or not.

It is true, if the drayman had not run his load against the lumber the accident would not have occurred, and, on the other hand, if the lumber had not been in the street, it would not have occurred. Dispense with either of these facts, and there would have been no injury. The liability cannot be tested in this manner, nor by comparing the negligence of the two, if both were guilty of negligence. If the presence of the lumber-pile in the street was at the time chargeable to the negligence of the city, and such negligence, together with the act of the drayman, caused the injury, it would be in part the proximate cause. This view is in accord with the decisions of our supreme court. In the case of *International etc. R'y Co. v. Clark*, 81 Tex. 48, this doctrine is unmistakably adopted by our supreme court. Henry, J., delivering the opinion, approves the principle stated by text-writers, quoting from them as follows: "An intervening act of an independent voluntary agent does not arrest causation, nor relieve the person doing the first wrong from the consequences of his wrong, if such intervening act was one which would ordinarily be expected to flow from the act of the first wrong-doer. The mere fact

that another person concurs or co-operates in producing the injury, or contributes thereto in any degree, whether large or small, is of no importance." The opinion proceeds to add: "If the negligent acts of the defendant and the electric-wire company were simultaneous and concurrent, both were liable for the consequences." See other authorities cited in the case.

In the case before us, as has often been said, the question of negligence or not on the part of the city should have been left to the jury. If the city were guilty of negligence, and it was a concurring proximate, existing cause of the injury, and the plaintiff was guilty of no contributory negligence, she should recover. The jury should determine these issues from all the facts, taking into consideration the powers, duties, and rights of the city under its charter and city ordinances. The court erred in taking the case out of the hands of the jury by the charge. The charge seems to lay stress upon the fact that the lumber was carefully and safely piled, and that if it was, the verdict should be for the defendant.

The most important question was, Was it negligent for the city to suffer the lumber to remain in the street at all? Was the lumber-pile an obstruction in the street? and was the city negligent in not removing it, or causing it to be done? If there was no negligence in this, or the city could lawfully allow the obstruction in the street (but we do not say it would be lawful for the purposes shown), then the manner of piling the lumber might become important to show negligence, or if negligence is shown in allowing it to be there, the manner of piling might be an additional proof of negligence; but it does not occur to us that the petition raises this question. If it were unlawful and negligent to fail to remove it from the street, the fact that it was carefully and safely piled would be immaterial, provided its being there was a concurring proximate cause of the injury. By proximate cause we do not mean the last act of cause, or nearest act to the injury, but such act, wanting in ordinary care, as actively aided in producing the injury as a direct and existing cause. It need not be the sole cause, but it must be a concurring cause, such as might reasonably have been contemplated as involving the result under the attending circumstances: *Eames v. T. & N. O. R'y Co.*, 63 Tex. 664, 665; *Jones v. George*, 61 Tex. 353; 48 Am. Rep. 280; *Seale v. Gulf etc. R'y Co.*, 65 Tex. 277, 278; 57 Am. Rep. 602; *Brandon v. Gulf City etc. Mfg. Co.*, 51 Tex. 128; 1 Thompson on Negligence, 144; 2 Thompson on Negli-

gence, 1100, sec. 12, and note; 1 Sutherland on Damages, 20, 22.

We conclude that, because of the error in the court's charge, the judgment should be reversed, and the cause remanded.

NEGLIGENCE — PROXIMATE CAUSE. — In determining what is proximity of cause, the true rule is, that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the circumstances of the case, might and ought to have been foreseen by the wrong-doer as likely to flow from his acts: *West Mahanoy Tp. v. Watson*, 116 Pa. St. 344; 2 Am. St. Rep. 604, and note collecting previous cases in the series; *Jacksonville etc. R'y Co. v. Peninsular Land etc. Co.*, 27 Fla. 1. One guilty of negligence is deemed to have foreseen, and is liable for all consequences which may naturally ensue therefrom without the intervention of some other independent agency, although in advance the actual result might have seemed improbable: *Bunting v. Hogsett*, 139 Pa. St. 363; 23 Am. St. Rep. 192; *Quigley v. Delaware etc. Canal Co.*, 142 Pa. St. 388; 24 Am. St. Rep. 504. The neglect of a city to keep its streets in proper condition for safety does not render it liable, when such negligence is the remote, but not the proximate, cause of the injury: *Olins v. Crescent City R. R. Co.*, 43 La. Ann. 327; 28 Am. St. Rep. 187. See further, notes to *Brown v. Chicago etc. R. R. Co.*, 41 Am. Rep. 53-58; *Forney v. Geldmacher*, 42 Am. Rep. 390-393; *Campbell v. City of Stillwater*, 50 Am. Rep. 569-574; *White v. Conly*, 52 Am. Rep. 157-166.

NEGLIGENCE — PROXIMATE CAUSE is a question for the jury, if the facts are disputed: *West Mahanoy Tp. v. Watson*, 116 Pa. St. 344; 2 Am. St. Rep. 604; *Troy v. Cape Fear etc. R. R. Co.*, 99 N. C. 298; 6 Am. St. Rep. 521.

CONCURRENT NEGLIGENCE: See note to *Village of Cartersville v. Cook*, 16 Am. St. Rep. 250-257. When an accident occurs from two causes, each due to the negligence of different persons, but together the efficient cause, then all the persons whose acts contributed to the accident are liable for the resulting injury, and the negligence of one is no excuse for the negligence of the other: *Gulf etc. R'y Co. v. McWhirter*, 77 Tex. 356; 19 Am. St. Rep. 755; *Consolidated etc. Co. v. Keifer*, 134 Ill. 481; 23 Am. St. Rep. 688; *Electric R'y Co. v. Shelton*, 89 Tenn. 423; 24 Am. St. Rep. 614; *Jacksonville etc. R'y Co. v. Peninsular Land etc. Co.*, 27 Fla. 1.

HARLOWE v. HUDGINS.

[84 TEXAS, 107.]

DEEDS — ASSIGNMENT OF — RECORD AS EVIDENCE. — When the record of a deed is offered in evidence by consent, and the record shows, immediately following such deed, without any space or lines intervening, the following: "Assignment. — I assign the within to Elizabeth Graham, for value received of her," — followed by the signature and acknowledgment of the grantee named in the deed, both instruments purporting to be acknowledged before the same officer the same day, the record of both being apparently in the same handwriting, and with but a single file-mark for

the record of both, the record of the assignment is admissible, in connection with the record of the deed, for the purpose of showing what the assignment refers to, and that in fact it was indorsed on the deed, and that it referred thereto and to the land therein described.

DEEDS — SUFFICIENCY OF. — No precise technical words are required to be used in a conveyance of real estate. The use of any words which amount to a present contract of bargain and sale is sufficient. Whatever may be the inaccuracy of expression or the inaptness of the words used in the instrument, the courts will give effect to it, if an intention to pass the title can be discovered therefrom.

DEEDS — ASSIGNMENT OF. — An assignment in the following words, "I assign the within, for value received," indorsed upon and immediately following the words of a deed, and duly acknowledged and signed by the grantee named therein, is sufficient to vest the title to the land described in the deed in the assignee named in such assignment.

Bassett, Seay, and Muse, for the appellants.

Searcy and Garrett, and M. M. Kinney, for the appellees.

FISHER, J., Section B. This is a suit of trespass to try title, brought by appellants against appellees, for certain lands described in the petition. Appellees pleaded not guilty, and the three, five, and ten years' statutes of limitations. It is admitted that William B. Travis and Robert E. Handy are the original grantees of the land, and that both plaintiffs and defendants respectively claim title under them, and that they are common source. It is admitted that appellants are the children and heirs of Mrs. Elizabeth Graham, wife of John M. Graham, and that the said Elizabeth and John M. Graham are both dead. Appellants, as title, introduced in evidence, — 1. The record of a deed from R. E. Handy to James Stephens, whereby Handy conveyed all his interest in the lands; the deed dated October 23, 1838. 2. Deed executed by James Stephens to John M. Graham, dated October, 1841, and recorded August 7, 1844.

The appellants offered to read in evidence from the records of Washington County the following instrument, to wit: —

"Assignment. — I assine the within to Elizabeth Graham, for value received of her, the sum of fourteen hundred and sixty-three dollars and thirty-three cents, this April 11th, 1843.

[Signed]

"J. M. GRAHAM.

[Test] "JACOB BARNES.

"N. D. GRAHAM."

"Republic of Texas, County of Washington.

"Before me, John Gray, clerk of the county court in and for the county aforesaid, came John M. Graham, and acknowl-

edged to me that he signed over the above deed as therein expressed. Given under my hand and seal of office this seventh day of August, 1844.

[L. s.]

[Signed] "JOHN GRAY, C. O. W. C."

To which instrument the appellees objected, — 1. Because said instrument was void for uncertainty; 2. Because there was nothing on said record to show to what deed the alleged assignment had reference; and 3. Because the acknowledgment was not sufficient to admit said instrument to record. Which objections the court sustained, and excluded said instrument.

Upon the refusal of the court to admit this instrument in evidence, the appellants took a nonsuit, and judgment was thereupon entered dismissing the case, with judgment for costs against appellants. It appears that the parties to the suit all agreed that copies of deeds found in the records of Washington County might be read in evidence without accounting for the originals, and without filing and giving notice thereof.

The appellants presented a motion to set aside the nonsuit and judgment dismissing the case, and that it be reinstated on the docket. The court overruled the motion. The refusal of the court to admit this instrument in evidence, and the overruling of the motion to set aside the judgment dismissing the case, are the only questions determined in this opinion.

Appellants, in their motion to set aside the nonsuit and reinstate the case, say that they were surprised at the ruling of the court in excluding said instrument, and that they will be able to show on another trial, by one Napoleon Graham, a subscribing witness to said instrument, that it was indorsed on the deed from James Stephens to John M. Graham, and that it referred to the land mentioned and described in said deed; that the witness Graham resides in the state of Washington, and that his affidavit in evidence cannot be procured at the present term, but will be secured at the next term.

It appears from the statements of the bill of exceptions made and offered to the action of the court in excluding this instrument that it is recorded on page 818 of book E, being the same page on which the record of the deed from Stephens to Graham is found, and that it follows immediately after said deed, without any space or line intervening; that both instruments purport to be acknowledged before the same officer and on the same day; that the record of both is apparently in the

same handwriting and done with the same pen and ink; that there is but a single file-mark on the record of said instruments.

These facts are very persuasive in producing a reasonable belief that the excluded instrument was in fact indorsed and written on the deed from Stephens to Graham, and that it referred to the deed and the land therein described. At least the circumstances were of sufficient importance to entitle the fact as to what deed, if any, the instrument referred to should be submitted to the jury and passed upon by them. The court could not, as a matter of law, determine that this instrument did not refer and relate to the deed from Stephens to Graham. We think the certificate of acknowledgment to this instrument is sufficient, under the law in force at the time it was taken: Hartley's Digest, art. 2777.

It is apparent that it was the purpose of Graham to acknowledge that he signed the instrument for the purpose therein expressed. The words "signed over the above deed," in the certificate of acknowledgment, do not detract from the meaning we have given to the certificate. The words not only mean that he has transferred his right in the deed to which the acknowledged instrument refers, but that, also, he signed the instrument as therein expressed.

The difficult question we have in the case is the proper construction to be given to the excluded instrument. The law in force at the time this instrument was executed gave a form of conveyance, but provided that "other forms not contravening the laws of the land should not be invalidated." The common law, which was also in force in this state at the date of this instrument, did not require the use of technical words in making a conveyance. The employment of words sufficient to show a purpose and intent to convey is all that was required, either by the statute or common law. No precise technical words are required to be used in creating a conveyance; the use of any words which amount to a present contract of bargain and sale is all-sufficient. Whatever may be the inaccuracy of expression or the inaptness of the words used in an instrument, in a legal view, if the intention to pass the title can be discovered the courts will give effect to it and construe the words accordingly. The word "assign" is defined, "to make or set over to another; to transfer; as to assign property or some interest therein": 2 Bla. Com. 326; Black's Law Dict. 97. The word "assignment" means, "the act by which one

person transfers to another or causes to vest in another his property, or an interest therein; the transfer or making over the estate, right, or title which one has in lands and tenements": Black's Law Dict. 97, 98; Burrill on Assignments, sec. 1. The construction of instruments alike in many respects to the one before us was passed upon and considered in the case of *Hutchins v. Carleton*, 19 N. H. 510. In the opinion the court say: "As to the words necessary to be used in a deed under our statute, a great latitude—a least, a great liberality—has been allowed. . . . It may well be said, as is said in regard to deeds of bargain and sale, nothing can be more liberal than the rule of law as to the words requisite to create them. 'Assign and make over' are as effectual, when a good consideration is expressed, as 'quit my claim,' or many other forms that have been sanctioned as sufficient to raise a use or pass an estate. 'Assign' is, in the opinion of Chancellor Kent, tantamount to 'grant,' and effectual for all purposes of the deed of grant established by the statutes of the state of New York: 4 Kent's Com. 491, 492, in notes." The word "grant," when used in an instrument, is construed as an operative word of conveyance. The instrument before us mentions Elizabeth Graham as the grantee, and that the sum of \$1,463.33, the consideration stated, was received from her, and states that "I assign the within to Elizabeth Graham." If it be true that this instrument refers to the deed executed by James Stephens to Graham, or was written and indorsed on the deed (which are facts to be passed on by the jury), then the words, "I assign the within," are effectual not only to pass the title to the paper upon which the deed from Stephens to Graham was written, but also to pass the title to the land described in the deed. Such was the evident purpose and intention of Graham in executing this instrument. This is gathered, not alone from the use of the words "assign the within," but also from the consideration paid as stated in the instrument. If the word "within" refers to a certain deed, and it is produced, and it appears therefrom that it conveys certain described lands, then the essential of this instrument as a perfect conveyance—that is, the description of the land conveyed, which, upon the face of this instrument, is not given—is supplied and made perfect by the deed referred to. We think the instrument before us sufficient as a conveyance when aided by the "within" referred to.

We report the case for reversal.

CONVEYANCE — WORDS SUFFICIENT TO CONSTITUTE. — Intent Governs. — It is well settled that no particular form of words is necessary to effect a conveyance of real estate. Any words which denote the intention of the parties to a deed to transfer the title from one to the other are sufficient to make a conveyance: *Gambriel v. Rose*, 8 Blackf. 141; 44 Am. Dec. 760; 2 Bla. Com. 298; 4 Kent's Com. 460. Any writing which contains a grantor, a grantee, a description of the land or interest therein granted, or a reference to some other instrument showing such description and making it certain, together with words which may be construed to imply a grant by the grantor to the grantee, is a sufficient deed if executed according to the law of the state where the land is situated. An instrument purporting to be a deed will be effectual if it contains, in any part, apt words of conveyance; but if no words importing a grant can be found therein, it will be deemed utterly void, although in other respects formal and regular: *Hummelman v. Mounts*, 87 Ind. 178; *Webb v. Mullins*, 78 Ala. 111; *Sharp v. Bailey*, 14 Iowa, 387; 81 Am. Dec. 489; *Brown v. Manter*, 21 N. H. 528; 53 Am. Dec. 223. In *Webb v. Mullins*, 78 Ala. 113, the court said that "the title to land can be transferred from one person to another only by apposite and appropriate language. It was not the intention of the statute to dispense with the use of any words whatever operative to convey. By the statute, the duty is imposed upon the courts to liberally construe the words employed in the conveyance as words of transfer, and give them effect and operation according to the intention of the grantor, to be collected from the entire instrument. There must, however, be some words intended as words of conveyance. They cannot be supplied by judicial interpolation." So in *Hummelman v. Mounts*, 87 Ind. 178, Mr. Justice Elliott, in delivering the opinion of the court, said: "While it is true that if, in any part of the instrument, apt words of conveyance are used, the instrument will be treated as a deed, it is also true that if no such words can be found in any part, it will be deemed utterly devoid of force: *Davis v. Davis*, 43 Ind. 561. Instruments will be so construed as to carry into effect the intention of the parties, but there must always be sufficient words to enable the courts to ascertain from the instrument what this intention was. Courts cannot, however, make contracts for the parties. It is not their province to write in an instrument words which will make it operative as a deed, when none of that character have been written by the parties themselves. The rule that courts will so construe an instrument as to make it effective does not mean that courts will inject into it new and distinct provisions." The intent, when apparent, and not repugnant to any rule of law, will control technical terms, for the intent, and not the words, is the essence of every agreement. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with a view to give every part of it meaning and effect: *Flagg v. Eames*, 40 Vt. 16; 94 Am. Dec. 363; *Collins v. Lavelle*, 44 Vt. 230; *Hoyans v. Carruth*, 19 Fla. 84; *Stewart v. Lang*, 37 Pa. St. 201; 78 Am. Dec. 414; *Ware v. Richardson*, 3 Md. 505; 56 Am. Dec. 762; *Thorn-ton v. Mulquinne*, 12 Iowa, 549; 79 Am. Dec. 548. However untechnical and ungrammatical the words of a deed may be, it will still be valid if it sufficiently and legally declares the grantor's intention: *Doe ex dem. Cobb v. Hines*, Busb. 343; 59 Am. Dec. 559; *Thompson v. McKay*, 41 Cal. 221; *Sprague v. Edwards*, 48 Cal. 249. In *Grueber v. Lindenmeier*, 42 Minn. 100, the court said: "Technical rules of construction are not favored, and are not to be so applied as to defeat the intention of the parties, for such rules of construction, in modern times, have given way to the more sensible rule,

which is, in all cases, to give effect to the intention of the parties, if practicable, when no rules of law are violated. Too much stress is not to be laid on the grammatical construction or forms of expression used. The cardinal rule of construction is to ascertain and give effect to the intention of the parties to the instrument; and to this end the court must consider all parts of it, and the construction must be upon the entire deed, and not upon disjointed parts. And if the language is ambiguous, resort may be had to evidence of surrounding circumstances and the situation of the parties, if necessary, in order to throw light upon their intention." "Courts are to so construe the words of a grant, if possible, as to give effect to it, if it be plain that the parties intended it as an effective conveyance. In the construction, the expressed will of the parties is to control. If this be plain upon the face of the instrument, courts are to go no further, though the words used frustrate the grant itself. Where the expression of the intent is doubtful and ambiguous, the most material and certain among the evidences of intent are to be selected and accredited": *Jennings v. Briceadine*, 44 Mo. 335.

"Whenever the language of the conveyance evidences the intention of the grantor to convey the entire dominion, ownership, and control of the land immediately to the grantee, it should be held as effectual for this purpose as any other conveyance, by either of the modes of transferring title recognized by the common law": *Baker v. Westcott*, 73 Tex. 129-133.

It is not essential that a deed of conveyance should follow any prescribed form of words. If the intention to convey is clearly expressed, it will not be defeated by the fact that the instrument also partakes of the nature of a contract. Thus when a conveyance is embodied in a contract, and from the whole instrument it clearly appears what land is intended to be conveyed, and to whom the land will pass, although the grantee is not formally named in the conveying part of the instrument, nor the land particularly described, and although reference to another deed may be necessary to ascertain the particular description thereof: *American Emigrant Co. v. Clark*, 62 Iowa, 182.

An instrument conveying all debts, dues, and demands, real, personal, and mixed, which are due and owing or of right belonging to the grantor, by virtue of inheritance, legacies, bonds, notes, book debts, or otherwise, to the grantee, passes real estate: *McWilliams v. Martin*, 12 Serg. & R. 259; 14 Am. Dec. 688. On the other hand, the words "grant, assign, bargain, and sell" unto a named person "all and all manner of goods, chattels, debts, money, and all other things of me whatsoever, as well real as personal, of what kind, nature, and quality soever, to have," etc., have been held not sufficient to pass the title to real estate: *Ingell v. Nooney*, 2 Pick. 362; 13 Am. Dec. 434. It has also been decided that a deed containing the words "sign over," as the only words which by any construction may be deemed operative words of conveyance or grant is not sufficient to convey an estate in land: *McKinney v. Settles*, 31 Mo. 541. The better rule, however, would seem to be, that the words "assign and make over," or "mortgage, assign over, and transfer," are sufficient, in a deed duly executed, to pass the legal title to a freehold estate: *Hutchings v. Carleton*, 19 N. H. 487; *Gambrell v. Roe*, 8 Blackf. 140; 44 Am. Dec. 760.

Indorsement or Assignment on Deed, Effect of. — In *Armstrong v. Stovall*, 28 Miss. 275-281, it is broadly asserted "that a memorandum or indorsement written on a deed at the time of its execution becomes a part of the deed." It would seem, however, that such indorsement on the deed must be sealed, in order to make it effective in those states where a seal is necessary to the

validity of a deed. The above assertion was made in a case where the deed purported on its face to be a conveyance of separate estate by a wife, with the consent of her husband, and which was signed, sealed, and acknowledged by both, although the name of the husband did not appear in the body of the deed as a grantor. In both *Armstrong v. Stovall*, 26 Miss. 275, and *Stone v. Montgomery*, 35 Miss. 83, such a deed was deemed sufficient to pass the legal title.

A redelivery of a deed containing an unsealed indorsement signed by the original vendee, to the effect, "I transfer the within deed to the grantor named therein again," or "I relinquish all my right and title to the within deed," will not operate as a reconveyance of the legal title to the estate conveyed by the deed: *Doe ex dem. Linker v. Long*, 64 N. C. 296; *Tunstall v. Cobb*, 109 N. C. 316; *Lessee of Bentley's Heirs v. Deforest*, 2 Ohio, 221; 15 Am. Dec. 546; *Arms v. Burt*, 1 Vt. 303; 18 Am. Dec. 680. But where the grantee in a deed places on the back of it an assignment, under his hand and seal, of all his right, title, and interest "in and to the within deed," to his son, for value, and then delivers it to such son, such assignment will convey the legal title, if surrounding circumstances indicate an intent to transfer the land: *Lemon v. Graham*, 131 Pa. St. 447.

In Iowa, a deed is not required to be sealed, and the title to land will pass by operation of a deed not under seal, and no reason is observed why the title will not pass under an assignment indorsed on the deed, although no seal is anywhere attached to the deed: *Pierson v. Armstrong*, 1 Iowa, 282; 63 Am. Dec. 440. And the same rule applies in Texas: *Frost v. Wolf*, 77 Tex. 455; 19 Am. St. Rep. 761; and in California: *Stanley v. Green*, 12 Cal. 148; Cal. Civ. Code, sec. 1092; *Moore v. Waddle*, 34 Cal. 145.

In all states where a seal is required by statute to be attached to a deed, an instrument having the form of a deed, but executed without a seal, is not a deed. But when it appears that it was made with the intent to pass an estate, and is otherwise sufficient for that purpose, it will be enforced in equity: *Jewell v. Harding*, 72 Me. 124; *Floyd v. Ricks*, 14 Ark. 286; 58 Am. Dec. 374; *Munds v. Cassidley*, 98 N. C. 558; *Frost v. Wolf*, 77 Tex. 455; 19 Am. St. Rep. 761; *Beardsley v. Knight*, 10 Vt. 185; 33 Am. Dec. 193. And so although an unsealed assignment of a deed indorsed thereon by the grantee will not operate to reconvey the legal title to the land in those states where a seal is necessary to the validity of a deed, yet such assignment, especially if founded upon a valuable consideration, may be treated in equity as a valid contract to reconvey, and, in a proper action, a specific performance thereof may be decreed: *Doe ex dem. Linker v. Long*, 64 N. C. 296; *Tunstall v. Cobb*, 109 N. C. 316; *Lessee of Bentley's Heirs v. Deforest*, 2 Ohio, 221; 15 Am. Dec. 546.

HEIDENHEIMER v. BAUMAN.

[§4 TEXAS, 174.]

WILL CREATING TRUST WITHOUT NAMING BENEFICIARY. — A trust created by will, without anywhere referring to or designating the beneficiaries for whom the trust is intended, is inoperative and void.

WILLS — TRUSTS — CERTAINTY OF DEVISE — EXTRANEOUS WRITING TO AID. — A will, on its face, or by reference to some writing existing at the time when the will is executed, and so referred to and identified as to become a part of it, must declare not only what enumerated bequests and devises shall be, but also who shall take them, directly, or beneficially through a trustee, and an extraneous writing not so identified is inadmissible to aid a trust created by will without naming a beneficiary.

WILLS — EVIDENCE OF TESTATOR'S INTENT. — Parol evidence is admissible to give effect to an intention expressed in a will, but such evidence is never admissible for the purpose of showing a testator's intention by proof of his oral declarations of intent, either as to the persons who shall take his estate, or as to what particular part of his estate any one person was intended to receive.

WILLS — CONSTRUCTION OF STATUTE. — While the language of the Texas statute prescribing the requisites to a will is affirmative, it as fully denies testamentary effect to parol declarations as it would if it expressly declared that no testamentary disposition of property should be made in manner other than that prescribed.

WILLS — IN THE ABSENCE OF A VALID TESTAMENTARY DISPOSITION by a testator of any part of his estate, it vests in his heir at law.

WILLS — INOPERATIVE TRUST VESTS BENEFICIAL INTEREST IN HEIR AT LAW. — When a bequest is declared upon its face to be upon such trusts as the testator has otherwise signified to the devisee, he takes no beneficial interest; and if the trusts are not sufficiently defined by the will, or other writing identified as part of it, the equitable interest goes to the heirs, or next of kin, as property of the deceased not disposed of by the will.

WILLS — TRUSTS NOT SUFFICIENTLY DECLARED on the face of a will, or by a writing identified as a part of it, cannot be set up by extrinsic evidence to defeat the rights of the testator's heirs at law, or next of kin.

WILLS — INOPERATIVE TRUSTS. — A bequest in trust, without a declaration of the beneficiaries on the face of the will, or by some other writing that can be regarded as part of it, is no bequest at all, so far as the beneficial interest is concerned, and it vests by law in the heir of the testator.

Scott, Levi, and Smith, for the appellant.

McLemore and Campbell, for the appellees.

STAYTON, C. J. The discussion of this case depends on the effect to be given to a clause in the will of Samson Heidenheimer. The entire will is as follows: —

"1. I direct that all my just debts shall be paid.

"2. Besides the property which I heretofore donated and gave to my wife, Anna Heidenheimer, and which consists of

two notes executed by Abe Heidenheimer, and indorsed by M. Lasker, aggregating twenty-eight thousand dollars, also a note executed by Nelson Davis & Co. for twelve hundred dollars, certain bank stock held by me in a bank at Austin for two thousand five hundred dollars, a note of one Rosenberg for fifteen hundred dollars, and my life insurance, amounting to fifteen thousand dollars, I hereby give and bequeath to my said wife the further sum of twenty-eight thousand three hundred dollars, to be paid to her out of my estate by my executors.

"3. All other property, both real and personal, which I may own or may be entitled to at the date of my death, after paying the aforesaid legacy to my wife, I give, devise, and bequeath to my brother, Abe Heidenheimer, in trust, to be disposed of by him as I have heretofore or may hereafter direct him to do.

"4. My executors are authorized and empowered to sell and dispose of any and all property of my estate, to pay any and all just debts which I may owe, and the legacy herein made to my wife; and the said Abe Heidenheimer shall have full power to sell and dispose of any of the property herein devised and bequeathed to him, as trustee, for the purpose of carrying out my directions to him in regard thereto.

"5. I hereby nominate and appoint Meyer Bauman, of St. Louis, and Abe Heidenheimer, of Galveston, to be executors of this will and of my estate, and direct that no security shall be required of them as such executors; and it is my will that no other action shall be had in the county court in relation to the settlement of my estate than to probate and record this will and to return an inventory, appraisalment, and list of claims of my estate.

"In testimony whereof, I have hereunto signed my name this fourth day of February, A. D. 1891.

[Signed]

"SAMSON HEIDENHEIMER."

This was probated; and the debts having been paid, the widow asserts claim to the entire estate not disposed of in due course of administration, on the ground that the third clause of the will is inoperative, because it does not designate the beneficiaries for whom the trust was intended.

It is conceded that plaintiff is entitled to recover as sole heir if the clause is inoperative. The attorney who wrote the will was permitted to testify, over objection, to some matters that were unimportant, in the view we take of the case; for we

would, in the particular matter referred to, give the same construction to the language of the will as written which would be given to it if the word supposed to have been unintentionally omitted had been inserted. He was, however, permitted to testify as follows: —

“Samson Heidenheimer told me, before I wrote his will, that he had instructed his brother, Abe Heidenheimer, as to the disposition he (Abe) should make of the property which he (Samson) left to him in trust by the will. What these instructions were he did not tell me.”

“Interrogatory 7. Why did you cause to be written in said last sentence of said third clause, ‘or may hereafter direct him to do,’ after having written, ‘as I have heretofore’? State fully. A. I was of the opinion that the sentence, ‘or may hereafter direct him to do,’ merely showed that the testator, by reason of the instructions which he had already given to his trustee, and which did not appear on the face of the will, had not thereby abandoned or surrendered control of his property, or his legal right to change his will in such manner as the law permitted him to do; and as the instructions he had given to the trustee were known to said trustee alone, this clause should show that they were intended to be permanent and final, unless changed by codicil or new will.

“Interrogatory 8. Are you familiar with the fourth clause of said will as written for Samson Heidenheimer, and as executed and probated? If yea, please state why you provided therein, as was done, that ‘said Abe Heidenheimer shall have full power and authority to sell and dispose of any of the property herein devised and bequeathed to him, as trustee, for the purpose of carrying out my directions to him in regard thereto.’ What directions were referred to by you,—those already given to Abe Heidenheimer, or some that had not been given? A. I am familiar with the fourth clause of said will. The provision inquired of was put in the will to enable the said trustee fully to carry out the instructions which the testator had theretofore given him, the testator thinking that such a power in the trustee might be necessary for the purpose of executing his (the testator’s) directions. The directions referred to by this clause of the will were those the testator had already given to said Abe Heidenheimer, and none others, as the language used plainly expresses.

“Interrogatory 10. What was the condition of the health of Samson Heidenheimer at the time of the execution of said

will? How soon afterward did he die? A. Samson Heidenheimer's health was not good; he suffered with some ailment, the nature of which I do not know, but for which he was about to submit to a surgical operation. He left my office to undergo the operation, and died within some seventeen or eighteen days after the operation had been performed."

One of the executors conceded the right of the widow, but the nature of the defense set up by the other will appear from the will, and the evidence of that executor, whose testimony, so far as it need be stated, was as follows: "Samson Heidenheimer came to me on the morning of the day he made the will, and he sat down in the office and told me of his intention to make the will, and he also stated that he wanted to put seventy-five thousand dollars in my trust, for which I should distribute it according to the way he instructed me; and I told him as I could not keep everything in my memory I would write that down, and I sat down at the desk and wrote that down on a piece of paper and read it off to him, and asked him if this was what he wanted, and I told him I wrote it down as he called it off to me."

The witness, in response to an interrogatory by his counsel, offered the written memorandum. The plaintiff objected to the question and answer and to the testimony above given, because the witness undertook now to add to the will, and there was no averment that any such matter testified to has been offered along with the will for probate, and it is incompetent now to be urged as part of the will, or in connection with it. The court overruled the objection, and admitted the evidence, to which ruling the plaintiff excepted.

It was admitted that nothing was ever offered for probate except what is in the will itself, and that the only matter that has been probated is the matter that is before the court as the will.

The paper introduced in evidence by the witness Abe Heidenheimer over plaintiff's objection is as follows: "I wrote down the instructions of Samson Heidenheimer as to what I shall do to carry out his testament if S. H. should die before I die. If sufficient money remains over after the debts of Samson Heidenheimer are paid, I am to divide it thus: His niece Rosa Obenheimer shall receive on the day of her wedding, five thousand dollars; Meta Obenheimer on her wedding day, five thousand dollars; Lena Lowenberger on her wedding day, five thousand dollars; Sara Lowenberger on her

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wedding day, five thousand dollars; my sister, Jetta Davis, five thousand dollars. The balance left over shall be divided among Isaac Heidenheimer, Sara Heidenheimer, Joseph Heidenheimer, and Gretchen Heidenheimer, and the parents shall have control of the property only until their children are so that the parents can pay it over to their children. It would more satisfactorily meet the wish of S. H. that the money be placed at interest until it is to be divided among the children of my brothers. My brother Abe understands how to carry out this matter better than he can write it on paper."

The witness further, over the objections of plaintiff, recited the conversations had between him and Samson Heidenheimer before and after the making of the will, such conversations relating to the contents of the will; and also testified that the written memorandum above referred to was read to Samson Heidenheimer at the time it was made; that it was in existence before the execution of the will, and Samson Heidenheimer knew of its existence, and that it was preserved as a memorandum.

The alleged beneficiaries under the third clause of the will seem to have become parties to the suit, but it does not very clearly appear how this was done, and on trial before the court it was adjudged that the will vested all the estate remaining after payment of the debts and the bequest to Mrs. Anna Heidenheimer in Abe Heidenheimer, in trust for the persons alleged by him to be the beneficiaries.

The vital questions in this case are: 1. Are the third and fourth paragraphs of the will inoperative, if considered in the light of the entire will? 2. May they be aided by such testimony as was introduced?

The last of these questions will be first considered. The statute provides that "every last will and testament, except where otherwise provided by law, shall be in writing and signed by the testator, or by some person by his direction and in his presence, and shall, if not wholly written by himself, be attested by two or more credible witnesses above the age of fourteen years subscribing their names thereto in the presence of the testator": Rev. Stats., art. 4859. This statute applies to wills whereby either real or personal property is disposed of; and the purpose of it was to require every testator to leave evidence in writing, attested as the statute requires, of the testamentary disposition made of his estate, except in those

cases in which nuncupative wills are permitted, in order that the highest evidence of testamentary intention might be furnished, and fraud and perjury prevented; and it matters not whether the bequest or devise be directly to the legatee or devisee, or to a trustee who may be required to hold and administer it for a time for the benefit of the real beneficiary. In either case, the will, on its face, or by reference to some paper existing when the will is executed, and so referred to and identified as to become a part of it, must declare not only what the bequest or devise shall be, but also who shall take it, directly, or beneficially through a trustee. If, after a will is executed, the testator desires to change parts of it, or to add to it, this may be done by a codicil, which must, however, be executed with the same formalities made necessary by the statute to the validity of testamentary papers.

In the paper before us the beneficiaries are not in any manner pointed out, nor can it be claimed that this was done by any paper referred to and so identified as to make it a part of the will. The memorandum made by the person named in the will as trustee amounts to no more than would the oral declaration of the testator to the trustee; and the last paragraph in it, whether written by the testator, or by the trustee at his dictation, suggests a doubt as to whether the preceding parts of the memorandum correctly expressed the wish of the testator as expressed orally by him to the person named in the will as trustee. The evidence introduced was offered for the purpose of showing what the intention of the testator was as to the disposition of the residuum of his estate, and not for the purpose of enabling the court to carry out an intention clearly expressed in the will, but which might be applied to more than one person or thing, on account of a latent ambiguity; and when offered for such a purpose, we know of no rule of evidence which justifies the admission of such testimony. To admit it and give effect to it would make a will, whatever the testimony of one or more witnesses may swear was intended by the testator, when the statute requires such intention to be manifested by a writing executed with the formalities prescribed.

Parol testimony is admissible often to enable a court to give effect to an intention expressed in a will; but it is unnecessary in this case to enumerate the purposes for which such evidence may be received, for such evidence is never admissible for the purpose of showing a testator's intention by

proof of his oral declaration of intent, either as to the persons who shall take his estate, or as to what particular part of his estate any one person was intended to receive. The existence of such a statute as that in force in this state ought to be deemed a sufficient answer to a proposition that such evidence as was admitted in this case ought to be admitted for the purpose of showing who the testator intended should be the recipients of his bounty; for there are no parts of a testamentary paper more important elements in its validity than those which name the beneficiaries, and declare what part of the testator's estate each shall receive. While the language of the statute prescribing the requisites to a will is affirmative, it as fully denies testamentary effect to parol declarations as would it if it expressly declared that no testamentary disposition of property should be made in manner other than that prescribed. The reasons on which the requirements of the statute are based have been too often stated to require repetition, are founded on sound public policy, and require the rejection of such evidence as was received in this case: Wharton on Evidence, 992-994; Abbott's Trial Evidence, 84; Wigram on Wills, 10-13; 1 Greenleaf on Evidence, 289-291; 1 Redfield on Wills, 496-508; 1 Jarman on Wills, 409-413; Schouler on Wills, 567-569.

Are the third and fourth paragraphs of the will sufficient, looking to the entire will, to divest appellant of her right to the estate, which, it is claimed, passed by the three paragraphs? In so far as the fourth paragraph seems to confer power on the person named as the trustee, it is clearly dependent on the third, and adds nothing to it in the way of disposing of any part of the estate.

In the absence of a valid testamentary disposition by the testator of any part of his estate, such estate vested in his heir at law; and it cannot be claimed that the third and fourth paragraphs of the will were intended to confer on the person named as trustee any personal or beneficial right to any of the property of the estate of the testator; and, as said by the supreme court of Massachusetts. "where the bequest is declared upon its face to be upon such trusts as the testator has otherwise signified to the devisee, it is equally clear that the devisee takes no beneficial interest; and as between him and the beneficiaries intended, there is as much ground for establishing the trust as if the bequest to him were absolute on its face. But as between the devisee and the heirs,

or next of kin, the case stands differently. They are not excluded by the will itself. The will, upon its face, showing that the devisee takes the legal title only, and not the beneficial interest, and the trust not being sufficiently defined by the will to take effect, the equitable interest goes, by way of resulting trust, to the heirs, or next of kin, as property of the deceased not disposed of by his will": *Sears v. Hardy*, 120 Mass. 524, 541, 542. They cannot be deprived of their equitable interest, which accrues to them directly from the deceased, by any intention of the deceased, unless signified in those forms which the law makes essential to every testamentary disposition. A trust not sufficiently declared on the face of the will cannot therefore be set up by extrinsic evidence to defeat the rights of the heirs at law, or next of kin: *Lewin on Trusts*, 3d ed., 75; *Olliffe v. Wells*, 130 Mass. 221.

The statutes of the state of Massachusetts differ in no material respect from the statutes in force in this state relating to the requisites of testamentary papers, and the case before cited denies to the paragraphs of the will in question capacity to deprive appellant of any right she would have if her husband had died intestate. To the same effect are the following cases: *Thayer v. Wellington*, 9 Allen, 283; 85 Am. Dec. 753; *Nichols v. Allen*, 130 Mass. 211; 39 Am. Rep. 445; and many others which might be cited. In the case last cited some of the cases relied on by appellee for the maintenance of a different rule are considered, and shown not to be applicable to the case before us.

It is very generally held that as against a devisee or legatee who has procured a devise or bequest to himself, absolute in terms, on promise orally made to a testator to hold for the benefit of, or that he will convey it to, another, that the intended beneficiary, as against him, may establish and enforce the trust with which the law affects him; but this is based on his breach of confidence or fraud, which, in many cases, gives rise to trusts; and on like grounds, in other cases, beneficiaries have been permitted to establish by oral testimony and to enforce against devisees trusts growing out of testamentary dispositions of property; but in those cases it will be found most generally that the will was sufficient to divest the heir of right. The theory on which those cases stand is thus clearly stated: "Where a trust not declared in the will is established by a court of chancery against the devisee, it is by reason of the obligation resting upon the con-

science of the devisee, and not as a valid testamentary disposition by the deceased: *Cullen v. Attorney-General*, L. R. 1 H. L. 190. Where the bequest is outright upon its face, the setting up of a trust, while it diminishes the right of a devisee, does not impair any right of the heirs or next of kin in any aspect of the case; for if the trust were not set up, the whole property would go to the devisee by force of the devise; if the trust set up is a lawful one, it inures to the benefit of the *cestuis que trust*; and if the trust set up is unlawful, the heirs, or next of kin, take by way of resulting trust": *Olliffe v. Wells*, 180 Mass. 224.

The rule is thus declared: "But it is not admissible in any other mode [will executed in accordance with the statute] to declare trusts which will be binding upon those to whom property is conveyed by will. But when the will gives a legacy or devise to any one upon trust, without declaring such trust, and none is afterward declared, or if so, only in an informal mode, the legatee or devisee will not hold absolutely under the bequest, but he will hold in trust for the testator's heir at law, or next of kin, the bequest virtually lapsing by reason of being left incomplete. But if the legatee or devisee be not named as trustee in the will, no informal attempt to declare a trust in behalf of the bequest will affect the title of such legatee or devisee. And when the law requires a will of personalty to be executed with the same formalities as a will of real estate, or with any other formalities, it will require testamentary trusts in regard to such property to be established by the same formalities. . . . Any other rule in regard to testamentary trusts would be liable, and very likely in practice, to trench gradually upon the prescribed formalities in the execution of wills; for if trusts of a testamentary character might be declared by the testator by mere oral declarations, or by writing not executed with the same formalities required in the execution of wills, men's final dispositions would, in many cases, be made up largely of such acts and declarations as the cupidity of claimants and the recklessness or indifference of witnesses might dictate": 3 Redfield on Wills, 572.

"Sometimes a testator distinctly shows an intention to create a trust, but does not go on to denote with sufficient clearness who are to be its objects; the effect of which obviously is, that the devisees or legatees in trust (whom we suppose to be distinctly pointed out) hold the property for the benefit of the person or persons on whom the law, in the absence of dis-

position, casts it; in other words, the gift takes effect with respect to the legal interest, but fails as to the beneficial ownership": 1 Jarman on Wills, 383.

"If a testator should devise real or personal property to A in trust, and state no trust on which A is to hold, no paper not referred to in the will, and not duly executed, could be received in evidence to prove the trusts; nor could A hold the beneficial interest, because he is stamped with the character of a trustee, but he would hold only the legal title, while the beneficial interest would descend or result to the testator's heirs at law": 1 Perry on Trusts, 93.

The bequest to Abe Heidenheimer being in trust without a declaration of the beneficiaries in the face of the will, or by some paper that can be regarded as a part of it, is no bequest at all, so far as the beneficial interest is concerned; for it shows an intention that this should not vest in him, and does not declare in whom it shall vest, and the law vests it in appellant, who is the heir of the testator.

This ruling may defeat the real intention of the testator; but, under the law, we cannot seek for nor recognize a testamentary intention not evidenced as the statute requires it to be, in order to avoid what may seem to be a hardship in the particular case.

The judgment of the court below will be reversed, and here rendered for appellant, on the main questions in the case, which renders it unnecessary to consider other questions in the case necessary to have been considered had our conclusions been different. It is so ordered.

WILLS, PAROL EVIDENCE REGARDING. — As to parol evidence to explain or identify subject or beneficiary of wills, see note to *Kurtz v. Hibner*, 8 Am. Rep. 669-673. As to extrinsic evidence to explain wills, see note to *Chambers v. Watson*, 46 Am. Rep. 72-78. As to parol evidence to establish trust in a bequest, see note to *Towles v. Burton*, 24 Am. Dec. 413-417. Parol evidence is admissible to control the terms of a will only in two cases, namely, to explain a latent ambiguity and to rebut a resulting trust: *Mann v. Mann*, 14 Johns. 1; 7 Am. Dec. 416; *Avery v. Chappel*, 6 Conn. 270; 16 Am. Dec. 53; as where, from some ambiguity or obscurity, a difficulty arises in applying the words of the will to the subject-matter of a devise or legacy: *In the Matter of Wells*, 113 N. Y. 396; 10 Am. St. Rep. 457; *Sturgis v. Work*, 122 Ind. 134; 17 Am. St. Rep. 349. But parol evidence is never admissible to show what the testator intended to write: *Sturgis v. Work*, 122 Ind. 134; 17 Am. St. Rep. 349. Therefore, parol evidence, even of the person who drew the will, is inadmissible to show a mistake, and that the testator intended to dispose of the property in a different manner from that appearing on the face of the will: *Rothmahler v. Myers*, 4 Desaus. Eq. 215; 6 Am. Dec. 613; *Jack-*

see v. Sill, 11 Johns. 201; 6 Am. Dec. 363. Nor is such evidence admissible to show that in drawing the will the scrivener inserted words that varied the meaning of the instrument: *Iddings v. Iddings*, 7 Serg. & R. 111; 10 Am. Dec. 450; *Kurtz v. Hibner*, 55 Ill. 514; 8 Am. Rep. 665; *Fitzpatrick v. Fitzpatrick*, 35 Iowa, 674; 14 Am. Rep. 538; or that certain legacies, intended to have been given to certain persons, were omitted by the person who drafted the will: *Constock v. Hadlyme etc. Soc.*, 8 Conn. 254; 20 Am. Dec. 100; or that a provision for the widow was intended to be in lieu of dower: *Hall v. Hall*, 8 Rich. 407; 64 Am. Dec. 758; or that the testator intended to devise a different lot from that described in his will, and that the intention was not correctly expressed, owing to a misapprehension of the draughtsman as to the lot described: *Norman v. Hookins*, 67 Miss. 192; 19 Am. St. Rep. 297.

WILLS — RIGHT OF HEIR TO UNDISPOSED OF ESTATE. — When lands are devised upon trust for a particular purpose, and there is a balance left, or the trust fails, the unexhausted residuum goes to the heir, like undisposed of real estate: *Mahorney v. Hoos*, 9 Smodes & M. 247; 48 Am. Dec. 706.

TRUSTS, WHEN VOID. — A trust without a beneficiary who can claim its enforcement is void, and this objection is not obviated by the existence in the trustees of a power to select a beneficiary, unless the claim of the persons in whose favor the power may be exercised has been designated with such certainty that the court can ascertain who were the objects of the power: *Tilden v. Green*, 130 N. Y. 29; 27 Am. St. Rep. 487.

CHICAGO, TEXAS, AND MEXICAN CENTRAL RAILWAY COMPANY v. TITTERINGTON.

[84 TEXAS, 218.]

DEED OF RIGHT OF WAY — CONSTRUCTION. — An absolute conveyance of a right of way from a land-owner and his wife to a railway company, reciting that it is given for and in consideration of the enhanced value to be given and contemplated to arise to the grantor's land and other property by the location and construction of the railroad, and for the consideration of full and complete value accruing in locating and maintaining a station on the land granted, is in no sense executory, and passes the title to the land entirely out the grantors, and to the railway company. In such case the promises or obligations of the railway company referred to in the deed are in the nature of covenants, not conditions, and the grantors cannot reclaim the land on account of the non-performance of the covenants by the grantee, but can only sue for the damages arising from the breach of the contract.

FRAUD. — ORDINARILY, PROMISES TO PERFORM ACTS IN THE FUTURE, although made by one party as a representation to induce the other to enter into the contract, will not amount to legal fraud, though the promises are subsequently entirely broken and unfulfilled without excuse.

FRAUD — PROMISES, WHEN AMOUNT TO, AND WHEN QUESTION FOR JURY. — When a railway company, at the time of receiving an absolute conveyance of a right of way, promises to locate and maintain a depot on the land granted as part of the consideration for the deed, but with no intention, at the time, of performing the promises, using them merely as

false pretenses to induce the grantor to execute the deed, and if its conduct did have that effect, such promises, coupled with an utter failure and refusal to perform them, is such actual fraud as will authorize the grantor to have the contract rescinded, and the land restored to him. But if such promises were made in good faith at the time of the contract, and the grantee subsequently changed its intention, and failed or refused to perform them, then such conduct by the company will not constitute such legal fraud as will justify the rescission of the contract or the cancellation of the deed. In such case the question as to whether the intent to defraud and deceive, at the time of making the contract, existed or not is a question of fact for the jury.

ACKNOWLEDGMENT BY SPECIAL DEPUTY CLERK. — The mere fact that a deputy clerk prefixes to his official signature the word "special" will not vitiate his act in taking the privy acknowledgment of a married woman to her deed of homestead community property.

HOMESTEAD, CONVEYANCE OF, BY HUSBAND ALONE. — The husband alone may convey a part of a community homestead to a railway company for a right of way, provided such conveyance does not operate to interfere with the enjoyment of the homestead by the wife.

LIMITATION TO AVOID DEED FOR FRAUD. — An action to avoid a deed on the ground of fraud is barred by the statute of limitations in four years. The statute begins to run from the discovery of the fraud, or from the time when it ought to have been discovered by the exercise of proper diligence and inquiry.

ACTION by Titterington and wife, brought on June 20, 1887, to cancel a deed made by them to a right of way, and executed April 16, 1881, upon the ground of fraud, failure of consideration, and the incapacity of an officer to take the privy acknowledgment of Mrs. Titterington. They recovered judgment for the possession of the land. The deed in dispute was of community homestead property, and recited "that for and in consideration of the enhanced value to be given, and is contemplated to arise, to our lands and other property by the location and construction of the Chicago, Texas, and Mexican Central railway, and for the consideration of full and complete value accruing to us by this transaction in locating and maintaining a station on the lands hereby granted, we," etc. The grantee in the deed made other promises to the grantors that it would erect and maintain a passenger and freight depot on the land granted. It platted a town on such land, but never built or attempted to build the promised depot thereon. The grantee went into possession in 1881, shortly after the grant, and constructed its road thereon, and the road has since been continuously operated, either by such grantee or its successor in interest, the appellant company. The grantors and appellees claim that they were induced to make the deed by the promises of the grantee concerning such depot, and

that such promises were falsely and fraudulently made, at the time, with intent to cheat, deceive, and defraud them. The appellant interposed the statute of limitations as a defense. The only issue submitted to the jury was the fraud of the grantee in procuring the deed, and in failing to erect a depot on the land.

Leake, Shepard, and Miller, and J. W. Terry, for the appellant.

John Bookhout, for the appellees.

MARR, J., Section A. Under the several assignments of error submitted by the appellants, it will be necessary to determine,— 1. Whether, in legal contemplation, the deed from the appellees contains any condition of defeasance; 2. The effect of the statutes of limitation upon plaintiffs' right of action, supposing that the deed was voidable only for fraud, and which will also involve the inquiry whether the representations which are relied upon to avoid the deed constitute fraud in legal acceptance; 3. Whether the officer who took the privy acknowledgment of the wife was competent to do so, and, in this connection, whether the deed would be void even without the acknowledgment of the wife, the property being community.

1. We have already sufficiently described the character and the terms of the deed in the statement of the case. We are of the opinion that the deed is in no sense executory, but that it passed the title to the land entirely out of the grantors and to the railway company. The appellees neglected to reserve any title in themselves, or to provide for the reversion of the estate in the event that the contract should be broken by the grantee. They have not attempted in this suit to recover damages and to charge the land with any lien in their favor: *Hess v. Harding*, 76 Tex. 28; 18 Am. St. Rep. 17; *Mayer v. Swift*, 73 Tex. 367. Of course, the right to a lien would depend upon the subsisting right (not barred by limitation) to obtain a judgment for some sum of money; but this would not give the right to avoid the deed and defeat the title conveyed by it. It is very evident that the deed contains no condition precedent; nor do we think that the language used would indicate even a condition subsequent. This case is plainly different from *Gulf etc. R'y Co. v. Dunman*, 74 Tex. 285. There the deed expressly provided that the title should

revert to the grantor in case of non-performance upon the part of the grantee. Of course, in case of a condition subsequent broken, the grantor has his election to re-enter and reclaim the land, or to sue for damages for a breach of the contract, and a suit for the land would be equivalent to a re-entry: *Gulf etc. R'y Co. v. Dunman*, 74 Tex. 265.

But conditions of this character are not favored by the courts, and in case of doubtful language or intention, the promise or obligation of the grantee will be construed to be a covenant limiting the grantor to an action thereon, and not a condition subsequent with the right to defeat the conveyance. Under the authorities, we think that it must be held, and we do hold, that the promises or obligations of the railway company referred to in the deed are in the nature of covenants, not conditions, and therefore the plaintiffs, aside from the other questions in the case, could not reclaim the land itself on account of the non-performance of the covenants or promises by the grantee, but would be required to sue for the damages arising from the breach of the contract: *Johnson v. Gurley*, 52 Tex. 222; *Mayer v. Swift*, 73 Tex. 367; *Chapin v. School District*, 35 N. H. 445; *Baker v. Compton*, 52 Tex. 252; 2 Cruise's Digest, 2; 3 Knight, 120; *Rawson v. Inhabitants etc.*, 7 Allen, 125; 83 Am. Dec. 670; *Packard v. Ames*, 16 Gray, 327; *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 548; *Selden v. Pringle*, 17 Barb. 458. See also *Ludlow v. New York etc. R. R. Co.*, 12 Barb. 440, though in that case a condition subsequent was expressly created.

It follows from what we have said that the court below should have instructed the jury, as requested by the defendants, that the deed in question conveyed the title to the land to the railway company unconditionally, and therefore to find for the defendants; but the court should have added a qualification so as to submit the other issues in the case to the decision of the jury. The instruction as requested was too strong, as it ignored entirely the issue of fraud; but it was sufficient to call the attention of the court to the subject. The court gave no charge upon the effect of the deed at all.

2. This brings us to the consideration of the questions of fraud and limitation. It is contended by the appellants that the plaintiffs' allegations of fraudulent representations do not show any fraud in legal contemplation, but only false promises to do something in the future, for the non-performance of which an action for damages might lie, or for specific per-

formance, but would not give any legal ground for the rescission of the contract. No exception was interposed to the sufficiency of the allegations as formal averments of the fraud and of the facts constituting the same. We shall therefore consider the allegations as sufficient to show the character of the acts and representations relied upon as constituting fraud and as disclosing the intention of the parties at the time of the execution of the deed. We concede that, ordinarily, a promise to perform some act in the future, although made by one party as a representation to induce the other to enter into the contract, will not amount to fraud in legal acceptance, though subsequently the promise is, without any excuse, entirely broken and non-fulfilled. This is a plain and well-established proposition, about which there can be no controversy; otherwise every breach of a contract would amount to fraud: *Bigham v. Bigham*, 57 Tex. 238; 8 Am. & Eng. Ency. of Law, 637, note 1. To the above rule, however, we think that there is a well-founded exception, though there is a conflict in the authorities upon the question. It has been distinctly recognized and announced by the supreme court, however, in this state. The exception may be stated as follows, and in reference to the case in hand: If the railway company, at the time it made the representations and promises before mentioned to the plaintiffs, did so with the design of cheating and deceiving the plaintiffs, and had no intention, at the time, of performing the promises, but used them merely as false pretenses to induce the plaintiffs to execute the deed, and if its conduct did have that effect, then we think that such acts and declarations, coupled with its subsequent utter failure and refusal to perform the promises or assurances, would amount to such actual fraud as would authorize the plaintiffs to have the contract rescinded and the land restored to them. But, upon the other hand, if the promises or representations were made in good faith at the time of the contract, and the defendant subsequently changed its mind, and failed or refused to perform the promises, then such conduct of the company, originally or subsequently, would not constitute such fraud, in legal acceptance, as would justify the rescission of the contract or the cancellation of the deed. We rest our decision upon the following authorities, beginning with the decision of our own supreme court in an analogous case, which is directly in point, and in principle cannot be distinguished from the present controversy: *Henderson v. San Antonio etc. R. R. Co.*,

17 Tex. 560; 67 Am. Dec. 675; *Dowd v. Tucker*, 41 Conn. 203; *Wilson v. Eggleston*, 27 Mich. 257; *Gross v. McKee*, 53 Miss. 536; *Shrewsbury v. Blount*, 2 Scott N. B. 588. Whether the intention to cheat and defraud existed at the time of the making of the contract was a question of fact for the jury, and they might well have inferred that the railway company in fact had no intention at that time of establishing the depot on the plaintiffs' land, from the fact that thereafter it did not even make a pretense of complying with the contract in this particular: *Dowd v. Tucker*, 41 Conn. 203. The court, therefore, did not, in our opinion, err in submitting the question of fraud to the jury.

The next inquiry in order is, Was the statute of limitation applicable as a defense to the action? The court, although requested so to do by the defendants, refused to submit this issue. If the action should be regarded as a suit for land, then we think limitation would be inapplicable, notwithstanding the defendants may have used the land as a right of way for more than five years, and paid the taxes thereon, because the character of the possession and claim would not constitute such adverse possession as would give title to the fee. If the defendants failed to establish the right to the easement, the plaintiffs could recover the land: *Hays v. Texas etc. Ry Co.*, 62 Tex. 397. But the legal character of the suit will depend upon the further question of whether or not the deed was absolutely void or only voidable. The specific statute of limitation of four years cannot be invoked in this case, as is evident from its terms: Rev. Stats., art. 3205; nor will the general statute prescribing that period apply if the suit is one for the "recovery of real estate"; hence the necessity for determining the character of this action: Rev. Stats., art. 3207. Of course the deed in question would only be voidable for fraud.

We deem it appropriate to determine at this point in the investigation the effect of this deed as a conveyance of an interest in the homestead of the appellees. The privy acknowledgment of the wife was taken in due form, but the officer signed himself as "special deputy clerk" of the county court, after he had duly signed his principal's name. This is the only defect, if that be one. We think that if the officer was a deputy clerk (as will be presumed, in the absence of any countervailing proof), the mere fact that he prefixed to his official signature the word "special" will not vitiate his acts.

But however this may be, it is the settled law in this state that the husband alone may convey a part of a community homestead to a railway company for a right of way, provided such conveyance does not operate to interfere with the enjoyment of the homestead by the wife. It was shown that the right of way does not in this instance disturb the homestead right or use: *Randall v. Texas Cent. R'y Co.*, 63 Tex. 586. We conclude, for this reason, that the deed in question was not void. The deed not being void, it would seem to follow that the suit should not be considered as an action to recover land. *Prima facie*, the deed conveys the title to the land, and the title remains in the grantee, unless the deed is set aside for fraud or other adequate cause for avoiding the contract.

We think that the primary purpose of the present suit is to cancel the deed upon the ground of fraud, and though a judgment for the land itself is asked, still, if this prayer should be granted, it would be rather as a result of the other relief, which must first be granted, than as the purpose for which the suit was brought. The land could not be recovered without first attacking directly and annulling the deed for fraud. That was the main purpose of the suit, and fixes the character of the action. The action is personal, and is entirely predicated upon the right to vacate the deed.

We think that the general statute of limitations of four years should have been given in charge by the court: Rev. Stats., art. 3207. See cases *infra*. Limitation commenced from the time when the plaintiffs discovered, or ought to have discovered, by the exercise of proper diligence and inquiry under the circumstances, that the railway company did not intend to erect the depot upon their land. Fraud prevents the operation of limitation only so long as it remains undiscovered: *Calhoun v. Burton*, 64 Tex. 516, and cases cited; *Meyer v. Andrews*, 70 Tex. 327. That the statute of limitation of four years applies to actions like the present has been expressly decided in two cases, and perhaps in others: *Cooper v. Lee*, 75 Tex. 114; *Shirley v. Waco Tap R'y Co.*, 78 Tex. 147; As the land is not the separate property of Mrs. Titterington, her disability would not exclude limitation: *Roemer v. Meyer*, Tex., Oct. 20, 1891; 17 S. W. Rep. 597.

The defendants also set up this statute by special exception, which was overruled; but there is no assignment of error presenting this ruling for revision. If the exception should be renewed upon another trial, it should be sustained: *Cooper*

v. Lee, 75 Tex. 114, and cases cited. The instruction as requested by the defendants and refused by the court was couched in such language as to take the question entirely from the jury. Still, it should have been given, with a proper qualification by the court, in accordance with the views which we have expressed, so that the jury should have been permitted to determine the issue under the law and the evidence. It is not so evident from the testimony that plaintiffs' action is barred that the court should have instructed the jury to find for the defendants upon that issue as a matter of law, although, as we have seen, the court might have held this upon the demurrer to the petition.

The refusal of the court to charge upon the subject of limitation is assigned as error, and we think that the assignment is well taken.

On account of the errors before indicated, the judgment should be reversed, and the cause remanded.

DEEDS—CONDITIONS SUBSEQUENT IN: See notes to *Cross v. Carson*, 44 Am. Dec. 743-759; *Farnham v. Thompson*, 57 Am. Rep. 63-68; *Raley v. Umatilla County*, 15 Or. 172; 3 Am. St. Rep. 142. Conditions subsequent are not favored in law, and are always strictly construed, since they tend to destroy estates: *Peden v. Chicago etc. R. R. Co.*, 73 Iowa, 328; 5 Am. St. Rep. 680; *Post v. Weil*, 115 N. Y. 361; 12 Am. St. Rep. 809, and note; *Morrill v. Wabash etc. R'y Co.*, 96 Mo. 174; *Curtis v. Board of Education*, 43 Kan. 138; *Graves v. Deterling*, 120 N. Y. 447. When a deed of conveyance was executed by the owner of a certain lot situated within a certain school district, conveying the lot in fee, and forever, to the members of the school board, and to "their successors in office, for the erection of a school-house thereon, and for no other purposes," and afterward that portion of the school district was severed from the remainder of the district, and placed within the corporate limits of a city, it was held that the school officers of such city became the "successors in office" of the officers of the school district, and the deed did not create an estate merely upon condition either precedent or subsequent, but the words, "for the erection of a school-house thereon, and for no other purposes," constituted only a limitation upon the manner in which the property should be used: *Curtis v. Board of Education*, 43 Kan. 138. So where a deed excepted a lot, previously conveyed by warranty deed to a township for common school purposes, and stated that the "lot was donated for school purposes so long as it shall be used for such purposes," after which the lot was used for thirty years for school purposes, it was held that the language in the deed to the township did not create a condition subsequent, but that if it did, the use of the property for thirty years for school purposes would be a substantial compliance with the condition: *Higbee v. Rodeman*, 129 Ind. 244. A deed to a railroad for a right of way recited that it was made to the grantee, its successors and assigns, in consideration of the benefits and advantages arising from the location, construction, and operation of the railroad, and of the sum of one dollar, and that "this agreement is made for

the location, construction, and maintenance of said railroad, and for that purpose only, and this license to operate in perpetuity if said railroad company, its successors and assigns, shall continue to maintain and operate their railroad, and cease with the nonuse of the same for such purpose." Held, that the deed should not be construed as made upon a condition that the road should have been built over the entire charter route of the grantee, and the failure so to build would not, therefore, work a forfeiture: *Morrill v. Wabash etc. R'y Co.*, 96 Mo. 174. But where a deed made a gift of land to a corporation "for the building and maintaining on said grounds an institution of learning, as provided by" a certain statute, it was held that the deed was made upon condition subsequent that the board should maintain upon the land an institution of learning in accordance with the provisions of that statute: *Mott v. Danville's Seminary*, 129 Ill. 403.

FRAUD, WHAT CONSTITUTES.—Fraud must relate to facts then existing, or which had previously existed: *Dawson v. Morris*, 149 Mass. 188; 14 Am. St. Rep. 404; *Bennett v. McIntire*, 121 Ind. 231; *Conant v. National Bank*, 121 Ind. 323; *Adams v. Schiffer*, 11 Col. 18; 7 Am. St. Rep. 202; *Feeny v. Howard*, 79 Cal. 525; 12 Am. St. Rep. 162. A promise to perform an act, though accompanied, at the time, with an intention not to perform, is not such a representation as is ground for an action at law; the party must sue on the promise: *People v. Healy*, 128 Ill. 9; 15 Am. St. Rep. 90. On the other hand, under the California Code, to make a promise with no intention of performing it constitutes a fraud for which a contract may be rescinded: *Lawrence v. Gayetty*, 78 Cal. 126; 12 Am. St. Rep. 29.

ACKNOWLEDGMENT—SUFFICIENCY OF CERTIFICATE.—Failure, in an acknowledgment, to show the official character of the person by whom it was taken is not fatal, and may be remedied by evidence of such official character: *Byer v. Etnyre*, 2 Gill, 150; 41 Am. Dec. 410; *Bennet v. Paine*, 7 Watts, 334; 32 Am. Dec. 765. Where the clerk of the circuit court is also recorder of deeds, the addition, in the acknowledgment of a sheriff's deed, of the word "recorder," after the name of the clerk, will not vitiate a deed: *Owen v. Baker*, 101 Mo. 407; 20 Am. St. Rep. 618.

LIMITATIONS OF ACTIONS.—FRAUD AS PREVENTING THE OPERATION OF THE STATUTES: See note to *Snodgrass v. Branch Bank*, 60 Am. Dec. 511-515. Where fraud or deceit is practiced, the statute of limitations does not begin to run until its discovery: See cases from the series collected in note to *Rumsey v. Snell*, 9 Am. St. Rep. 842; *Gillett v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 587; *Jacobs v. Snyder*, 76 Iowa, 522; 14 Am. St. Rep. 235; *Hawley v. Page*, 77 Iowa, 239; 14 Am. St. Rep. 275; *Cook v. Chicago etc. R'y Co.*, 81 Iowa, 551; 25 Am. St. Rep. 512; *Myers v. Center*, 47 Kan. 324; *Miller v. Wood*, 116 N. Y. 351; *Lewis v. Welch*, 47 Minn. 193; *Wichita etc. Co. v. State*, 80 Tex. 684. But the consequences of an actual discovery of the fraud will be imputed to a person who might, by the exercise of reasonable diligence, have made the discovery: *Parker v. Kuhn*, 21 Neb. 413; 59 Am. Rep. 838; *Penobscot R. R. Co. v. Mayo*, 67 Me. 470; 24 Am. Rep. 45; *Boyd v. Blankman*, 29 Cal. 19; 87 Am. Dec. 146; *Gillett v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 587; *Lane v. Lane*, 87 Ga. 268; *Marler v. Simmons*, 81 Ga. 611. Plaintiff must aver the facts constituting the fraud, and the time of its discovery; otherwise his petition will be open to demurrer: *Douglas v. Corry*, 46 Ohio St. 349; 15 Am. St. Rep. 604; *Lataillade v. Oresta*, 91 Cal. 555; 25 Am. St. Rep. 219. But, in an action for money had and received, where the complaint avers receipt of the money within the statutory period, and the answer de-

nies all the material allegations of the complaint, and alleges that the cause of action is barred by the statute of limitations, the plaintiff may prove and the jury may take into consideration any evidence of concealment of facts, misrepresentations, deceit, or other facts constituting fraud on the part of the defendant which would take the case out of the statute, though the complaint contains no averment as to those matters: *Williams v. Dennison*, 94 Cal. 540.

BONNER v. GRIGSBY

[84 TEXAS, 389.]

JUDGMENTS — LIEN OF — REGISTRY OF ABSTRACT. — When the number of a judgment is prescribed by law as a prerequisite to the record of an abstract of such judgment in order to create a lien, the number of the judgment cannot be dispensed with; and the registry of the abstract without giving such number does not create a lien.

JUDGMENTS — BONA FIDE PURCHASER UNDER. — A judgment creditor who levies upon land and then takes a deed therefor from his judgment debtor, crediting the price of the land upon the judgment, but not releasing the lien of his levy, is not a *bona fide* purchaser, but takes only such title to the land as is possessed by the judgment debtor, and therefore subject to any prior conveyance thereof made by him.

Duncan G. Smith, for the appellant.

Frank P. McGhee, for the appellee.

GAINES, A. J. The appellee brought this suit against appellant to recover certain lots in the town of Vernon, in Wilbarger County.

Both parties claimed under one L. N. Perkins as the common source of title. On the sixteenth day of September, 1882, one J. Doane, as county judge of Wilbarger County, executed to Perkins a bond for title to the lots in controversy, which purported to bind the county to execute to the obligee a warranty deed to the lots upon his paying the purchase-money, amounting to seventy-five dollars, with interest, and upon the acquisition of the legal title by the county. At that time it seems the land had not been patented, and the county claimed under third parties, who were expected to execute to it a deed whenever a patent should be issued. On the first day of January, 1883, Perkins, in consideration of the sum of thirty-five dollars, and of their payment of the balance of the purchase-money due Wilbarger County, conveyed the premises in controversy to G. W. Darby and A. Dawson. On the eighteenth day of December, 1883, Darby conveyed the lots to W. L. Gordon, who, on the 26th of August, 1886, conveyed the same to

appellant, who was the defendant in the court below. There was parol evidence to the effect that before Darby conveyed to Gordon, Dawson conveyed his interest to Darby, though the deed could not be found. Such is the appellant's title.

The appellee, the plaintiff in the court below, claimed title as follows: 1. A judgment in the county court of Wilbarger County, rendered on the sixth day of January, 1886, in favor of appellant against Perkins for the sum of \$482.82. 2. An abstract of the judgment recorded on the day of its rendition. The validity of this abstract is questioned. 3. The bond for title from Doane, as county judge, to Perkins, above described. 4. A deed from Hearne, as county judge, to Perkins, dated the twenty-eighth day of February, 1889, reciting the payment in full of the balance of the purchase-money. 5. A deed dated the twelfth day of March, 1889, from Perkins to appellee, to the premises in dispute, for the consideration, as recited, of four hundred dollars.

The plaintiff also introduced in evidence three executions which had been issued upon his judgment against Perkins, — one on the 26th of February, 1886; one on the 22d of September of the same year; the third on the 24th of July, 1888; and the fourth on the seventh day of March, 1889, which was levied on the lots in controversy, but which was returned by order of plaintiff's attorney. When the levy was released and the writ ordered to be returned, the return itself does not show, but the sheriff testified that this occurred after the twelfth day of March, 1889, the day on which the lots were conveyed by Perkins to appellee.

Perkins paid a part of the note given by him for the purchase-money of the lot, and Gordon seems to have paid twenty-five dollars, leaving a balance of thirty-five dollars still due. The defendant testified that he offered to pay the balance to the county judge of the county, but that he declined to make the deed, because no provision had been made for paying the expense of a conveyance. The defendant tendered, in his answer, forty dollars to cover the balance of the purchase-money, and paid it into court.

There was a judgment for the plaintiff for the lots in controversy. There are no conclusions either of law or of fact in the record, though it would seem that the court must have held that the plaintiff was a *bona fide* purchaser without notice of defendant's title. The defendant showed an equitable title, which became perfect by the tender of the balance of the

purchase-money due under Perkins's bond for title. If the plaintiff had acquired a lien upon the lots by a record of a proper abstract of his judgment, or by a levy of his execution before he had notice of defendant's title, or that of those under whom he claimed, or knowledge of such facts as should have put him upon inquiry, and had enforced his lien by a sale under execution at which he purchased, his title would have been good: *Grace v. Wade*, 45 Tex. 522. But this he did not do. He took a conveyance of the lots directly from Perkins, merely crediting the price agreed upon on his judgment, without even releasing, at the time, the lien he had acquired by the levy.

The abstract of judgment filed in the county court did not give the number of the judgment, and in that respect failed to comply with one of the requirements of the statute: Rev. Stats., art. 3155. The number of the judgment is one of the requisites prescribed by the law, and we have no more right to disregard it than any other provision which the legislature has prescribed as a prerequisite of the authority to record the abstract. The failure to comply with the statute in that particular is, in our opinion, fatal to the lien claimed by virtue of the abstract.

The lien created by the levy of the execution not having been released at the time Perkins conveyed the lots to the plaintiff, the case presents itself to our minds as one in which the purchaser has neither paid value nor placed himself, by the transaction, in a worse position than that previously held by him. Having merely credited the price of the lots upon his judgment, he cannot claim to be a *bona fide* purchaser for a valuable consideration without notice: *Steffian v. Milmo Nat. Bank*, 69 Tex. 513. He took, by his conveyance, the legal title to the lots in controversy, subject to the defendant's equity, and is entitled to recover only the balance of the purchase-money which Perkins's original vendee promised to pay for the property. The judgment is against the right of the case, and is fundamentally erroneous.

The view we take of the case renders it unnecessary to discuss the question of notice.

The judgment is reversed, and here rendered for appellant.

VENDOR AND PURCHASER. — A PERSON IS NOT A BONA FIDE purchaser who merely takes the legal estate in payment of or as security for a previous debt: *Dickerson v. Tillinghast*, 4 Paige, 215; 25 Am. Dec. 528; *Wood v. Chapin*, 13 N. Y. 509; 67 Am. Dec. 62.

**McCARN v. INTERNATIONAL AND GREAT NORTHERN
RAILWAY COMPANY.**

[84 TEXAS, 382.]

CARRIERS — CONNECTING RAILWAYS — CONTRACT LIMITING LIABILITY. — A connecting carrier by rail may, by contract, protect itself against liability for loss not occurring on its own line, whether the shipment is wholly within the state, or is interstate.

CARRIERS — CONNECTING RAILWAY — CONTRACT LIMITING LIABILITY. — A contract between a shipper and a connecting carrier by rail, stipulating that such carrier shall not be liable for anything beyond its own line, except to protect the through-rate of freight named, is valid, and will be enforced.

Edward Dwyer, for the appellant.

Barnard and Green, for the appellee.

STAYTON, C. J. This action was brought by appellant to recover damages for injury alleged to have been caused to sixty head of cattle while in transit from San Antonio, Texas, to Chicago, in the state of Illinois.

The cause was tried without a jury, and the court found that "the contract for shipment was a through-contract from San Antonio, Texas, to Chicago, Illinois," but that the contract, among others, contained the following stipulation: "And it is further stipulated and agreed between the parties hereto, that in case the live-stock mentioned herein is to be transported over the road or roads of any other railway company, the said party of the first part [appellee] shall be released from liability of every kind after said live-stock shall have left its road; and the party of the second part hereby so expressly stipulates and agrees; the understanding of both parties hereto being, that the party of the first part shall not be held or deemed liable for anything beyond the line of the International and Great Northern Railway Company, excepting to protect the through-rate of freight named herein."

The court further found that no injury occurred to appellant's cattle while on appellee's line of railway, but that the cattle were injured while on a connecting line, to which they had been delivered by appellee, and on these findings rendered a judgment against the plaintiff.

There is no statement of facts, and under the findings it must be conceded that appellee received the cattle under an agreement that they should be transported from San Antonio to Chicago; and the inference is, that to do this it was neces-

sary that they should pass over road or roads other than that of appellee. That in such a case a carrier may, by contract, protect itself against liability for loss not occurring on its own line, whether the shipment be wholly within this state, or be interstate, we had deemed a settled question in this court: *Gulf etc. R'y Co. v. Baird*, 75 Tex. 256; *Fort Worth etc. R'y Co. v. Williams*, 77 Tex. 121; *Hunter v. Southern Pac. R'y Co.*, 76 Tex. 195; *Texas etc. R'y Co. v. Adams*, 78 Tex. 372; 22 Am. St. Rep. 56; *Harris v. Howe*, 74 Tex. 534; 15 Am. St. Rep. 862.

This is the rule we understand to be recognized by nearly all of the English and American courts: *Myrick v. Michigan Central R. R. Co.*, 107 U. S. 102; *Pratt v. Railway Co.*, 95 U. S. 43; *Railroad Co. v. Pratt*, 22 Wall. 123; *Tardos v. Chicago etc. R. R. Co.*, 35 La. Ann. 15; *Louisville etc. R. R. Co. v. Meyer*, 78 Ala. 597; *Railway v. Brumley*, 5 Lea, 401; *Mulligan v. Illinois Cent. R'y Co.*, 36 Iowa, 186; 14 Am. Rep. 514; *Detroit etc. R. R. Co. v. Farmers' etc. Bank*, 20 Wis. 134 (*122); *Pendergast v. Adams Exp. Co.*, 101 Mass. 120; *Berg v. Atchison etc. R. R. Co.*, 30 Kan. 562; *St. Louis etc. R. R. Co. v. Larned*, 103 Ill. 293; *Field v. Chicago etc. R. R. Co.*, 71 Ill. 462; *American Exp. Co. v. Second Nat. Bank*, 69 Pa. St. 394; 8 Am. Rep. 286; *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616; *Snider v. Adams Exp. Co.*, 63 Mo. 882; *Taylor v. Little Rock etc. R. R. Co.*, 32 Ark. 393; 29 Am. Rep. 1; *Central R. R. etc. Co. v. Avant*, 80 Ga. 195; *Schiff v. New York etc. R. R. Co.*, 52 How. Pr. 91; *Merchants' etc. Transp. Co. v. Bloch Bros.*, 86 Tenn. 424; 6 Am. St. Rep. 847; *Illinois Cent. R'y Co. v. Frankenberg*, 54 Ill. 88; 5 Am. Rep. 92; *Burroughs v. Norwich etc. R. R. Co.*, 100 Mass. 26; 1 Am. Rep. 78; *United States Exp. Co. v. Rush*, 24 Ind. 403; *Chicago etc. R. R. Co. v. Montfort*, 60 Ill. 175; *Erie R'y Co. v. Wilcox*, 84 Ill. 239; 25 Am. Rep. 451; *Aldridge v. Great Western R'y Co.*, 15 Com. B., N. S., 582. Authorities upon this point might be multiplied. Even the case of *Muschamp v. Lancaster etc. R'y Co.*, 8 Mees. & W. 421, does not assert a different rule.

In England, and in some of the states of the Union, the mere receipt of goods to be carried to a destination beyond the line of the carrier who first receives them is held to evidence a contract to transport to such destination, while in others such receipt is not held to evidence a contract to convey beyond that carrier's line; but in the jurisdiction in which these diverse rulings are made there is a general concurrence of opinion in the proposition that the carrier may, by special contract, exempt itself from liability for an injury to freight

resulting after it has gone into the hands of another carrier to be transported to destination.

The ground of concurrence is contract, which, in some jurisdictions, it is held, is necessary to relieve from liability for the act of a connecting carrier over whose line the freight must or does pass to its destination; while in the other it is held that, in the absence of special contract, no such liability rests on the receiving carrier for injuries occurring after he has safely passed the freight to a connecting carrier.

There are, however, a few cases in which it has been held that a carrier, under such a contract as that involved in this case, is liable for an injury to freight after it has passed into the hands of a connecting carrier uninjured; and among these are found some decisions by the court of appeals of this state, with which we regret to differ.

In *Gulf etc. R'y Co. v. Vaughn*, Tex. App., Jan. 25, 1890, 16 S. W. Rep. 775, the liability of a carrier was asserted, although the shipping contract was substantially the same as that involved in this case, and two cases are invoked as authority for the ruling in that case. One of these is the case of *Gulf etc. R'y Co. v. Allison* (decided by this court), 59 Tex. 193. In that case the plaintiff shipped from Galveston, Texas, to Chicago, Illinois, five cars of melons, in cars adapted to their preservation and safe carriage, under an agreement that the melons should be transported in those cars, without change, to Chicago. The evidence tended to show that a connecting carrier to whom the cars were delivered placed the melons in other cars less adapted to their safe transportation, and that from this injury resulted. The shipping contract provided that the railway company should not be liable for injury resulting from some causes enumerated, and that the company should not "be liable for any damage, loss, or injury occurring not on its own railway."

In disposing of the case, it was said that the averments of the petition were to the effect that there was an agreement that the melons should be carried to their destination in the cars in which they were first placed. There is a general expression in the opinion that a carrier undertaking to carry freight to a destination beyond his own line cannot contract that his responsibility shall terminate at the end of his own line; but to ascertain what a court actually does decide, the facts on which the opinion is based must be considered, and no one paragraph in an opinion ought to be considered alone,

in arriving at the intention of the court. What this court did decide, and intend to hold, is so clearly expressed in the opinion in the case that we can but feel that had the whole opinion been read it ought not to have been understood to lay down any such rule as that it is cited to sustain.

It is said: "The exemption from liability is, however, available only when the carrier forwards the goods consigned to him in the manner and by the route with reference to which the contract is made. If he deviates from his route, or forwards the goods by a different conveyance from those contemplated by his agreement, he becomes an insurer of the goods, and cannot avail himself of any exception made in his behalf in the contract: *Fatman v. Railroad Co.*, 2 Disn. 248; *Robinson v. Merchants' Despatch Transp. Co.*, 45 Iowa, 470. The contract to forward the melons, in this case, through from Galveston to Chicago on the cars on which they were loaded was an entirety. By changing the cars after they left appellant's road the risk of their safe transportation was assumed by its agents (the connecting line, where the change occurred) for the company, and it became liable notwithstanding the stipulation against damages beyond its own terminus. A case in point is that of *Stewart v. Merchants' Despatch Transp. Co.*, 47 Iowa, 229; 29 Am. Rep. 476. There, goods were delivered to a transportation company at Worcester, Massachusetts, to be taken to Muscatine, Iowa, through, without transfer, in cars owned and controlled by the company, and the contract contained a clause of exemption against liability for loss by fire. When the goods reached Chicago they were transferred to a warehouse, and consumed by fire the same day. It was held that the company was liable for the loss, notwithstanding the exemption. The contract in this case, so far as the limitation of liability is concerned, was, in effect, that the defendant company were not to be liable for any damage or loss occurring beyond their own route, provided the freight should not be changed from the cars in which it was shipped."

Instead of being a decision in favor of the rule for which it was cited, the direct holdings in the opinion, as well as all the implications, are so strongly to the contrary that the views of this court in that case ought not to be misunderstood.

The other case cited in support of the adverse rule is *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; but it seems to us the opinion asserts no such rule as it was cited to maintain. That case was simply this: The Southern Express

Company and the Adams Express Company were engaged in the express business between New Orleans, Louisiana, and Louisville, Kentucky, the former transporting a package of money from New Orleans to Humboldt, Tennessee, where it was delivered to the latter for transportation to plaintiff at Louisville. There was a contract between the express companies by which they divided the compensation for such carriage in proportion to the distance a package might be transported by them respectively. Between Humboldt and Louisville both companies employed the same messenger, who was exclusively subject to the orders of the Southern Express Company when south of the northern boundary of the state of Tennessee, and to the orders of the Adams Express Company when north of that boundary. The shipping contract contained a clause exempting the carrier with which it was made from liability for loss "occasioned by the dangers of railway transportation, or ocean or river navigation, or by fire or storm," and it provided that this should inure to the benefit of any person or company to whom the property might be delivered for transportation. When the package was delivered at Humboldt to the Adams Express Company's messenger, who was the messenger of both companies, he took charge of it and placed it in an iron safe, and deposited the safe in an apartment of the car set apart for the use of the express company, for transportation to Louisville. While the train to which the car containing the packages was attached was passing over a trestle, and while the package was in the exclusive charge of the messenger, the trestle over which the car was passing gave way, and the car was thrown from the track, caught fire from the locomotive, and, with the money in the safe, was burned.

The action was brought against the Adams Express Company; and there being some evidence that the accident was caused by a defective trestle, the circuit court, in effect, instructed the jury that the exceptions from liability found in the shipping contract exempted the express company from liability, even though the accident may have occurred through the negligence of the railway company employed to transport the express company's messenger, and packages in his possession and custody.

From this statement it will be seen that no such question was presented in that case as arises in this. The claim was, that the shipping contract exempted the express company

from liability for a loss occurring through the negligence of the railway company it had employed to transport its messenger and the packages in his exclusive possession. The court, in effect, held that the railway company was the servant of the express company, for whose negligence the latter was responsible, and that for this reason, among others, the exemption from liability could not be allowed.

The express company had no means whereby to transport such packages as it might contract to transmit, other than such as it might hire from railway or other companies or persons engaged in the business of transportation; and if such companies or persons were not to be deemed the servants of the express company, that liability from which the common carrier cannot escape by contract could not be fixed on either in such cases.

That the express company was a common carrier in that instance was not denied; and it was declared so to be by the court, but its claim was that it was relieved from liability by the contract. This the court denied, on the ground before stated, and then proceeded to show how the case would stand as to the carrier under the facts of the case, as follows: "Express companies make their own bargains with the companies they employ, while they keep the property in their own charge, usually attended by a messenger. It was so in the present case. The defendant had an arrangement with the railway company, under which the packages of money, inclosed in an iron safe, were put into an apartment of a car set apart for the use of the express company, yet the safe containing the packages continued in the custody of the messenger. Therefore, as between the defendant and the railway company, it may be doubted whether the relation was that of a common carrier to his consignor, because the company had not the packages in charge. The apartment in the car was the defendant's for the time being; and if the defendant retained the custody of the packages carried, instead of trusting them to the company, the latter did not insure the carriage: *Miles v. Cattle*, 6 Bing. 743; *Tower v. Utica etc. R. R. Co.*, 7 Hill, 47; 42 Am. Dec. 36; Redfield on Railways, sec. 74. . . . Had the packages been delivered to the charge of the railway company without any stipulation for exemption from the ordinary liability of carriers, it would have been an insurer both to the express company and to the plaintiff. But as they were not so delivered, the right of the plaintiff to

the extremest constant vigilance during all stages of the carriage is lost, if the defendants are not answerable for the negligence of the railway company notwithstanding the exception in the bills of lading."

The same court, in the subsequent case of *Myrick v. Michigan Cent. R. R. Co.*, 107 U. S. 106, said: "A railway company is a carrier of goods for the public, and as such is bound to carry safely whatever goods are intrusted to it for transportation within the course of its business to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line, — that is, to deliver safely the goods to such line, the next carrier on the route. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. . . . The general doctrine, then, as to transportation by connecting lines, approved by this court, and also by a majority of the state courts, amounts to this: that each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence."

Can an obligation based alone on contract arise in the face of an express agreement that it shall not exist? That is the question involved in this and like cases, and to it, in our opinion, there can be but one answer. No court will assert that a common carrier is under obligation to carry, or to contract to carry, beyond its own line; but the decision to which we have referred, and any others that may be in harmony with it, in effect hold that the reception of freight destined, and known to be destined, to a point beyond the carrier's line who receives it, when the rate for through-transit is fixed by that carrier, constitutes a contract by which that carrier assumes the duties and obligations of a common carrier for

through-transit, and thereby becomes liable for the negligence of every connecting carrier in the route, notwithstanding the initial carrier, in the paper which evidences the only contract, expressly contracts that it shall not be so bound. Such a construction of such a contract, it seems to us, violates every recognized canon of construction applicable to such a matter, and denies effect to the clearly expressed intention of the parties, when the law interposes no obstacle to the enforcement of such intention based on grounds of public policy or other reason.

It seems to us a mistake to assume that the initial carrier, throughout an entire route formed by two or more independent but connecting lines, becomes a common carrier, when neither the rules of law nor the contract of the parties creates that relation, and upon this false assumption to base the proposition that it cannot exempt itself from liability for the negligence of a connecting carrier because the latter is the agent or servant of the former. If the relation be conceded, the proposition based on it would be a sequence; but that failing, the conclusion drawn from it falls.

Under the weight of American authority the contract in this case does not operate as a restriction on or exemption from liability; for to give that, liability, but for the contract, must have existed; while the contract was, in effect, an express agreement that no such liability existed or was intended or understood to exist.

Under English, and some American, decisions, the contract would operate as a restriction on the initial carrier's common-law liability; for in such a case, under that line of decisions, the liability would exist, in the absence of the contract; but these decisions recognize the right of such a carrier to limit his liability to his own line; for in such cases there is always a liability resting on some one of the connecting carriers for injury resulting from the negligence of itself or servants, and in some jurisdictions the full common-law liability will rest on some connecting carriers at all times. The latter would be true where freight was carried over two or more connecting lines all wholly within this state, for no one of them could restrict its own common-law liability by contract, but the liability of connecting carriers for injury to freight while in the possession of one of them is not the common-law liability.

It is unnecessary in this case to inquire what state of facts

between connecting carriers would be sufficient to cast upon each the liability of a common carrier for the negligence of another, for no facts are found in the record making such an inquiry necessary.

There was no error in the proceedings, and the judgment will be affirmed.

CARRIERS. — CONNECTING LINES, LIABILITIES OF: See notes to *Wells v. Thomas*, 72 Am. Dec. 230-247; *Lawrence v. Winona etc. R. R. Co.*, 2 Am. Rep. 141, 142; *Gray v. Jackson*, 12 Am. Rep. 40; *Hill v. Syracuse etc. R. R. Co.*, 29 Am. Rep. 166-169; *Nashville etc. R. R. Co. v. Sprayberry*, 35 Am. Rep. 708-711; *Hadd v. United States Exp. Co.*, 36 Am. Rep. 761, 762; *Louisville etc. R. R. Co. v. Weaver*, 42 Am. Rep. 664-667. Railroad company receiving goods consigned to place beyond its own terminus undertakes to convey same safely to point of destination, and will be liable for loss of such goods on connecting lines: *Fulsey v. Georgia R. R.*, 76 Ga. 597; 2 Am. St. Rep. 58; but may relieve itself of liability by special contract: *Illinois Cent. R. R. Co. v. Frankenberg*, 54 Ill. 88; 5 Am. Rep. 92; *McCarty v. Gulf etc. R'y Co.*, 79 Tex. 33. The connecting carrier who receives the goods from the company making the special contract cannot claim the benefit of the exemptions for injuries happening on its own road; otherwise where the receiving carrier contracts for the entire transportation, or, by authority of the connecting lines, fixes the compensation for the whole journey: *Western R'y Co. v. Harrell*, 91 Ala. 340. The rule that each one of the connecting carriers may, by special contract, limit its liability to its own line applies in the case both of passengers and goods: *Harris v. Howe*, 74 Tex. 534; 15 Am. St. Rep. 662.

SMITH v. WESTERN UNION TELEGRAPH COMPANY.

[84 TEXAS, 359.]

TELEGRAPH COMPANIES — LIABILITY OF CONNECTING LINES. — The analogy of connecting telegraph lines to connecting railways is so great that the established rules of law which determine the liability of the latter should be applied with equal force to the former.

TELEGRAPH COMPANIES — LIABILITY OF CONNECTING LINES. — When a telegraph company receives a dispatch for transmission from a connecting telegraph line, it is bound to exercise due diligence in transmitting and delivering the message, or respond in damages to the party injured by its failure to do so, and this without regard to the contract between the sender and the company first receiving the message as to its own liability. In such case the telegraph company inflicting the injury by its own act of negligence is liable for the damages caused thereby.

ACTION against the Western Union Telegraph Company to recover damages for its alleged negligence in failing to deliver the following telegram:—

"WAXAHACHIE, TEXAS, March 2, 1888.

"W. H. SMITH, 480 Harwood Street, Dallas, Texas.

"Father dangerously ill. Come at once.

"WESLEY SMITH."

This telegram was delivered, in the first instance, for transmission to the agent of the Central Texas and Northwestern Railway Company at Waxahachie, which owned a telegraph line from that city to the city of Ennis, where connection was made with the Western Union Telegraph Company's line. Wesley Smith paid such agent fifty cents as charges for the entire transmission and delivery of the message at Dallas. Such agent promptly transmitted the message to the Western Union company at Ennis, and the latter there accepted one half of the charges paid, and the telegram for the purpose of transmitting it to Dallas. This it failed to do until so late that the person addressed was prevented from being present during the last hours of his father's life, and by reason of such delay he did not reach his father's home until after his death. It was the custom and agreement between the railroad company and the telegraph company to divide all charges for the transmission of telegrams received at Waxahachie, and the telegraph company's lines extend from Ennis to Dallas.

H. G. Robertson and W. A. Kemp, for the appellant.

Stemmons and Field, for the appellee.

MARR, J., Section A. The court directed the jury, upon the trial below, to return a verdict for the defendant, upon the ground, as we are informed by the briefs of counsel, that plaintiff had failed to prove any contract for the transmission of his message with the Western Union Telegraph Company, against which he had brought his suit. In other words, the court held that if the plaintiff had, under the contract, any right of action, that it was against the Central Texas and Northwestern Railway Company alone, for the reason, as we presume, that the latter company had agreed, in the opinion of the court, to transmit the message to its destination, and therefore that the appellee was merely its agent employed for that purpose.

The plaintiff complains of the above charge of the court, and upon the trial below requested several special instructions, which were refused.

The analogy of connecting telegraph lines to connecting

railways is so great that it is believed that the established rules of law which determine the liability of the latter should be applied to the main question involved in this case, which relates to a connecting telegraph company: Scott and Jarnigan on Telegraphs, sec. 278; Gray on Communication by Telegraph, sec. 58, note 1.

In the case of *Gulf etc. R'y Co. v. Baird*, 75 Tex. 256, it is said that, "in the absence of a partnership or authority to make a joint contract binding upon all carriers over whose lines freight is to pass, connecting lines are but the agencies employed by the contracting carrier to perform its own contract." But according to the great weight of the authorities in the United States, the mere "marking or booking" of freight to a point beyond the line of the receiving carrier does not amount to a contract of through-transportation upon its part. The same may be said of the effect of a telegram addressed to a point upon the connecting line, although there should be no express limitation as to the liability of the first company: Porter on Bills of Lading, sec. 328; Gray on Communication by Telegraph, secs. 58, 59; Lawson on Contracts of Carriers, secs. 238-240; *Railroad Co. v. Pratt*, 22 Wall. 123.

But however this may be as affecting the liability of the initial carrier, it has been held by the courts of nearly every state in this country, including those which follow what is known as the English doctrine as to a through bill of lading, that nevertheless the connecting company will be liable if in fact it is the carrier which inflicted the injury or committed the negligence of which the plaintiff complains: Lawson on Contracts of Carriers, sec. 741; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; 8 Am. Rep. 165. This appears to be the later English doctrine, apparently upon the ground of tort: *Foulkes v. Metropolitan R'y Co.*, L. R. 5 C. P. D. 157; *Hooper v. Railway Co.*, 43 L. T., N. S., 570.

In the case of *Gulf etc. R'y Co. v. Baird*, 75 Tex. 256, it was also held that the connecting carrier would be "liable for any injury to the property while in its possession," etc., but was not responsible for the negligence of the other carriers. This decision is in perfect accord with the great current of authorities in this country: Porter on Bills of Lading, sec. 343, note 2. Each carrier should be held liable for its own acts of negligence, and even for the acts of the others if there is a partnership between all, or a joint contract binding upon each of them: *Gulf etc. R'y Co. v. Baird*, 75 Tex. 256. It has also

been held by good authority that where several railways constitute a continuous line, each of them performs a public duty and an independent employment, and in accepting freight from another carrier for further transportation over its own line, contracts expressly or by legal implication, not with the other carrier, but with the owner of the goods: *Sherman v. Hudson River R. R. Co.*, 64 N. Y. 254. In any event, we think that the contract in this case, which was made by the appellee, even if not made with the plaintiff, was clearly made on his behalf and for his benefit, and therefore he could elect to ratify and enforce it.

But again, whether we should regard the first company as the agent of the plaintiff or the agent of the defendant (the authorities conflicting on this point) in contracting with the appellee for the transmission of the telegram from Ennis to Dallas, it is evident that such contract is a binding agreement between the plaintiff and the defendant, for the breach of which, by the latter, the former may maintain his action for damages. The court therefore erred in directing the jury to find for the defendant.

The appellant further insists that the court erred in refusing to instruct the jury, at his request, to the effect that the defendant was bound by the written contract as its own act, because its execution had not been denied under oath by the defendant, and also because it had not denied under oath the existence of a partnership with the Chicago, Texas, and Northwestern Railway Company: Rev. Stats., art. 1265, secs. 6, 8; *International etc. R'y Co. v. Tisdale*, 74 Tex. 8; *Bradford v. Taylor*, 61 Tex. 508. The answer to this position is, that the petition does not allege any partnership, nor charge that the contract was executed by the defendant or under its authority. The Chicago, Texas, and Northwestern Railway Company does not appear to be even mentioned in the petition.

It may be further remarked, in reference to the issue of a partnership, had it been raised, that it should have been submitted to the jury, under appropriate instructions: *Gulf etc. R'y Co. v. Baird*, 75 Tex. 256; *Lawson on Contracts of Carriers*, sec. 242, and notes.

In view, however, of what we have said upon the other branch of the case, we deem it unnecessary to attempt to indicate what acts would be sufficient to authorize the presumption of a partnership between the connecting companies.

Because the court erred in charging the jury to find for the

defendant, we think that the judgment should be reversed, and the cause remanded.

TELEGRAPH COMPANIES — CONNECTING LINES. — The liability of each company for the safe transmission of a message does not extend beyond its own line: *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446. No partnership or mutual agency can be inferred between connecting lines of telegraph from the fact that each received from the other messages for transmission over its own line, as required by law, and each, in the absence of a special agreement or arrangement with the sender of the message or with each other, will be liable for its own acts only: *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165. Where the receiving company has limited its liability for error or delay in the transmission or delivery of a message to a small sum, and collects the whole sum due for the transmission of the message to a point on the line of a connecting company, the second company cannot avail itself of the conditions limiting the liability of the first company, and thus relieve itself of responsibility for negligence in delivering the message: *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157. The second company is solely liable, where the delay in the delivery of a message is caused by its own independent negligence, though the receiving company may also have been guilty of negligence in having changed the address. The change of address in such case cannot be regarded as the proximate cause of the loss: *Western Union Tel. Co. v. Munford*, 87 Tenn. 190; 10 Am. St. Rep. 630. As to the respective liabilities of connecting carriers, see note to *McJann v. International etc. Ry Co.*, ante, p. 59.

HEIGEL v. WICHITA COUNTY.

[34 TEXAS, 392.]

COUNTIES — LIABILITY FOR DEFECTIVE BRIDGES. — A county is not liable for injuries caused by a defective bridge, in the absence of a statute creating such liability, either expressly or by necessary implication.

COUNTIES' LIABILITY FOR NEGLIGENCE OF OFFICERS. — In the absence of a statute imposing liability, a county is not liable for injuries resulting from the negligence of its officers or agents.

COUNTIES AND CITIES — RESPECTIVE LIABILITY FOR NEGLIGENCE. — Cities, independent of statute, are liable to respond in damages for injuries resulting from a failure to discharge their corporate duties, while counties or other quasi municipal corporations are not liable for similar injuries, unless such liability is expressly or impliedly created by statute.

Cobb and Boyd, for the appellant.

Ashby S. James, for the appellee.

GAINES, A. J. This suit was brought by appellant to recover of Wichita County damages for personal injuries caused by a defective bridge. A demurrer was sustained to the peti-

been held by good authority that where several railways constitute a continuous line, each of them performs a public duty and an independent employment, and in accepting freight from another carrier for further transportation over its own line, contracts expressly or by legal implication, not with the other carrier, but with the owner of the goods: *Sherman v. Hudson River R. R. Co.*, 64 N. Y. 254. In any event, we think that the contract in this case, which was made by the appellee, even if not made with the plaintiff, was clearly made on his behalf and for his benefit, and therefore he could elect to ratify and enforce it.

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The appellant further insists that the court erred in refusing to instruct the jury, at his request, to the effect that the defendant was bound by the written contract as its own act, because its execution had not been denied under oath by the defendant, and also because it had not denied under oath the existence of a partnership with the Chicago, Texas, and Northwestern Railway Company: Rev. Stats., art. 1265, secs. 6, 8; *International etc. R'y Co. v. Tisdale*, 74 Tex. 8; *Bradford v. Taylor*, 61 Tex. 508. The answer to this position is, that the petition does not allege any partnership, nor charge that the contract was executed by the defendant or under its authority. The Chicago, Texas, and Northwestern Railway Company does not appear to be even mentioned in the petition.

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In view, however, of what we have said upon the other branch of the case, we deem it unnecessary to attempt to indicate what acts would be sufficient to authorize the presumption of a partnership between the connecting companies.

Because the court erred in charging the jury to find for the

defendant, we think that the judgment should be reversed, and the cause remanded.

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Cobb and Boyd, for the appellant.

Ashby S. James, for the appellee.

GAINES, A. J. This suit was brought by appellant to recover of Wichita County damages for personal injuries caused by a defective bridge. A demurrer was sustained to the peti-

tion, and the plaintiff having declined to amend, the suit was dismissed.

The question presented seems not to have been authoritatively decided in this court, though in *City of Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517, it is held that a city is liable under similar circumstances. But the opinion in that case recognizes the doctrine that a different rule applies as to counties. That cities may be made to respond in damages for injuries resulting from a failure to discharge their corporate duties, is affirmed by the courts of this country with practical unanimity. At the same time, it is very generally held that counties are not liable for similar injuries, unless such liability be created by statute, either by express words or by necessary implication. The latter doctrine has been applied in the following cases: *Mower v. Leicester*, 9 Masa. 247; 6 Am. Dec. 63; *Askew v. Hale Co.*, 54 Ala. 639; 25 Am. Rep. 730; *Haygood v. Justices*, 20 Ga. 845; *White v. County of Bond*, 58 Ill. 297; 11 Am. Rep. 65; *White v. Commissioners*, 90 N. C. 437; 47 Am. Rep. 534; *Brabham v. Board of Supervisors*, 54 Miss. 363; 28 Am. Rep. 352; *Reardon v. St. Louis Co.*, 36 Mo. 555; *Board of Comm'rs v. Riggs*, 24 Kan. 255; *Wood v. County Comm'rs*, 10 Neb. 552; *Livermore v. Board etc.*, 29 N. J. L. 245; *Wood v. Tipton County*, 7 Baxt. 112; 32 Am. Rep. 561; *Barnett v. Contra Costa Co.*, 67 Cal. 77; *Bartlett v. Crozier*, 17 Johns. 439; *Fry v. County of Albemarle*, 86 Va. 195; 19 Am. St. Rep. 879; *Mitchell v. Rockland*, 52 Me. 118; *Eastman v. Meredith*, 36 N. H. 284; 72 Am. Dec. 302; *Detroit v. Blackeby*, 21 Mich. 84; 4 Am. Rep. 450; *Granger v. Pulaski Co.*, 26 Ark. 37. Many of these cases approve former rulings in the same court, and show a well-established rule of decision in the courts in which they were delivered. The contrary doctrine has been held in the courts indicated by the following cases: *Board of Comm'rs v. Pritchett*, 85 Ind. 68; *Huff v. Poweshiek Co.*, 60 Iowa, 529; *Eyler v. County Comm'rs*, 49 Md. 257; 33 Am. Rep. 249; *Rigony v. Skuykill Co.*, 103 Pa. St. 382. In Iowa, counties are held liable for injuries incurred by defects in bridges; but in *Kincaid v. Hardin Co.*, 53 Iowa, 430, 36 Am. Rep. 236, it was decided by the supreme court of that state that no recovery could be had against a county for injuries received by reason of the negligent construction of a court-house. In that case the court say: "But as the line of decisions in this state as to the liability for defective bridges stands almost, if not quite, alone, as we have seen, we have no

disposition to carry the doctrine further than is necessary to sustain the decisions of the court, which have stood so long that it may truthfully be said that they have the implied sanction of the law-making power and the people of the state." See also 2 Dillon on Municipal Corporations, sec. 963; 4 Am. & Eng. Ency. of Law, 364.

It is apparent from the above citations that there is an overwhelming weight of authority in favor of the proposition that counties, as a rule, are not liable at common law for injuries resulting from the negligence of their officers or agents. The grounds upon which the decisions are placed are not uniform. Counties are not corporations in the fullest sense of that term. They are commonly called *quasi* corporations. They are created by the state for the purposes of government; their functions are political and administrative, and the powers conferred upon them are rather duties imposed than privileges granted. Cities, on the other hand, are deemed voluntary corporations; and while they exercise political functions, it is considered that their charters are granted, not so much with a view to the interests of the public as for the private advantage of their citizens. It is upon this distinction that the courts ordinarily base the difference in the rule of liability as applied to municipal corporations proper and to *quasi* municipal corporations, such as counties and townships. Other courts hold, that since a county is but a political subdivision of the state, a suit against the county is, in effect, a suit against the state, and that therefore an action will not lie without the consent of the legislature. But upon whatever ground it should be placed, it is fairly well settled that in cases like this cities are liable, and counties are not; and we therefore feel constrained by the authorities to hold that the petition under consideration showed no cause of action against Wichita County.

The judgment is affirmed.

COUNTIES, LIABILITIES OF. — That the liabilities of counties are the creature of statute, see notes to *Gilman v. Contra Costa Co.*, 68 Am. Dec. 291-295, and *White v. Bond County*, 11 Am. Rep. 66. For a collection of the cases in the series illustrating the application of this rule to public bridges, see note to *Lehigh County v. Hoffert*, 2 Am. St. Rep. 591. In Washington it is held that a county is not liable for personal injuries caused by a defective sidewalk under its control: *Clark v. Lincoln County*, 1 Wash. 518.

COUNTIES — LIABILITY FOR NEGLIGENCE OF COUNTY OFFICERS. — Counties are not liable to a private action at suit of a party injured by a neglect of
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their officers to perform a corporate duty, unless such right of action is given by statute: *Downing v. Mason County*, 87 Ky. 208; 12 Am. St. Rep. 473. And the same rule holds in regard to actions on contracts: *Lebcher v. Commissioners*, 9 Mont. 315; *Grant Co. v. Lake Co.*, 17 Or. 453. This privilege of suing counties can be withdrawn or denied at any time the legislature may think proper: *Hunsaker v. Borden*, 5 Cal. 288; 63 Am. Dec. 130.

CITY OF SHERMAN v. WILLIAMS.

[34 TEXAS, 421.]

MUNICIPAL CORPORATIONS — PROPERTY OF, SUBJECT TO EXECUTION. — Residence property conveyed to and received by a city from its tax collector as a settlement of taxes collected by him and not paid over, such property not being adapted to or used by the city for any public purpose, is not exempt from sale under execution.

MUNICIPAL CORPORATIONS — SPECIAL FUNDS — EXECUTION AGAINST. — When a city tax collector collects duly authorized taxes for a special city fund, and, failing to pay them over, the city takes a conveyance from him of his city residence property in settlement therefor, the property so acquired takes the place of such fund; and as the latter cannot be diverted to any other purpose than that for which it is created, it is not subject to execution in favor of a general creditor of the city, notwithstanding the fact that the municipal authorities may have misapplied the rents received from such property.

O. L. Vowell, for the appellant.

Wood and Mayfield, for the appellee.

STAYTON, C. J. The tax collector of the city of Sherman having failed to pay to the proper officer taxes collected to meet the obligation of the city on outstanding bonds issued to aid in the construction of certain railways, suit was brought against him and the sureties on his bond. In compromise of that claim, the tax collector conveyed to the city the property in controversy. This settlement was made in March, 1887, and since that time the city has endeavored to sell the property, without success, on account of some litigation about it; but in the mean time the property has been rented, and the money thus received has been placed in the current expense fund of the city. Appellee, being a judgment creditor of the city, caused an execution to be levied on the property, and it was advertised for sale, when this suit was brought to enjoin the sale, on the ground that the property was not subject to sale to satisfy the execution. The property is residence property, and not adapted to or used by the city for any public

purpose. A preliminary injunction was granted, but on final hearing this was dissolved, and a judgment entered for defendant, from which this appeal is prosecuted.

Both parties assert the ownership of the city, and therefore no question arises as to the power of the city to purchase the property in satisfaction of the liability of the tax collector and the sureties on his official bond.

The property is not of such character as to be exempt from forced sale as property owned and held only for public purposes, under the provisions of section 9 of article 12 of the constitution, or the express provision of any statute. If the property is exempt, it is because it must be held to stand in the same position as would the money collected by the tax collector on a tax levied to meet the interest and create a sinking fund with which to discharge the bonded indebtedness of the city at its maturity, the validity of which is not questioned. The city of Sherman is under incorporation under the general law, under which it had power to levy and cause to be collected the sum which the collector failed to pay over. That was required to be assessed and collected separately from the taxes assessed and collected for current municipal expenses: Rev. Stats., art. 437. When assessed and collected, this became a special fund, disbursable only for the purpose for which the fund was created, and any officer misappropriating such a fund is declared to be guilty of malfeasance in office, subject to removal, and thereafter incapacitated to hold any office in the municipality: Rev. Stats., art. 372.

The constitution provides that "counties, cities, and towns are authorized, in such mode as may now or may hereafter be provided by law, to levy, assess, and collect the taxes necessary to pay the interest and provide a sinking fund to satisfy any indebtedness heretofore legally made and undertaken; but all such taxes shall be assessed and collected separately from that levied, assessed, and collected for current expenses of municipal government, and shall, when levied, specify in the act of levying the purpose therefor, and such taxes may be paid in the coupons, bonds, or other indebtedness for the payment of which such tax may have been levied": Const., art. 11, sec. 6.

This makes a tax collected under it a special fund; and in view of the limitations placed by the constitution on municipal taxation, if such a fund, by the act of the municipal authorities or otherwise, could be diverted and used for some

other purposes, then constitutional restraints would become inoperative, and citizens subjected to taxation forbidden by the constitution. What cannot be done directly cannot be done indirectly.

The statute makes the further provision, that "all taxes levied, assessed, and collected for the purpose of paying the interest and principal of bonds heretofore issued by cities or towns to aid in the construction of railroads and other works of internal improvement shall be applied solely to the objects for which they were levied, under the direction of the comptroller, as follows: 1. To the payment of assessing and collecting the same; 2. To the payment of the annual interest of such bonds, and not less than two per cent of the principal; and if there be any excess on hand after making the above payments for the current year, it shall be used in the purchase and cancellation of said bonds": Rev. Stats., art. 4778.

The taxes collected could not have been appropriated to satisfaction of appellee's claim had they been paid over by the collector; and for the protection of the tax-payers as well as creditors, it seems to us that the property in controversy should be deemed a part of the fund, the misappropriation of which made it necessary for the city to acquire title to it.

If a tax-payer had failed to pay the tax on account of which the money was collected, then, on sale of his property, if no bid was made, it would have been struck off to the city and a deed made to it, under which the city would have had power to convey the property to a purchaser from it: Rev. Stats., art. 449. The money received on such a sale would go to the fund on account of which the tax was levied, and we see no reason why the proceeds of the sale of the property in controversy should not belong to the fund on account of which the taxes never paid over by the collector were collected; and the fact that the municipal authorities may have misapplied the rents of the property cannot affect the question.

On the conceded facts, the injunction should have been perpetuated, and the judgment will be reversed, and here rendered for appellant, perpetuating the injunction, and for costs. It is so ordered.

EXECUTION — EXEMPTION OF PROPERTY OF MUNICIPAL CORPORATION. — An execution cannot lawfully issue against the property of a municipal corporation, and when so ordered, that part of the judgment will be reversed: *Flora v. Nancy*, 136 Ill. 45. County revenues in the hands of the treasurer are not subject to seizure on execution: *Gilman v. Contra Costa Co.*, 8 Cal.

52; 68 Am. Dec. 290, and note 297. A house and lot owned by a city, formerly used by them as a fire-engine house, and still held for a like future use, is exempt from execution: *Curry v. Mayor*, 64 Ga. 290; 37 Am. Rep. 74. A public school house is exempt from execution: *State v. Tiedeman*, 69 Mo. 306; 23 Am. Rep. 498.

WHITFIELD v. CITY OF PARIS.

[34 TEXAS, 481.]

MUNICIPAL CORPORATIONS—POLICE POWER—LIABILITY FOR NEGLIGENT ACT OF OFFICER.—The enactment and enforcement of a city ordinance forbidding unmuzzled dogs to run at large is the valid exercise by a municipal corporation of its police power; and when it, by ordinance, directs and orders the killing of unmuzzled dogs found running at large upon its streets, and appoints or employs its policeman, and makes it his duty, and directs and orders him, to execute and carry out such ordinance and kill all such dogs, the city is not liable for the negligent and careless act of such policeman in executing such orders and duty, even though in so doing he inflicts painful and serious wounds upon a person lawfully upon the street.

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENT ACTS OF OFFICERS OR EMPLOYEES.—A city while acting, not in the management of its private or corporate affairs, but in the interest of the public, and as the guardian of the health, peace, convenience, and welfare of the public, is not liable for the negligent acts of its officers or employees engaged in the execution of its ordinances.

Dudley and Moore, for the appellant.

TARLTON, J., Section B. This appeal is prosecuted from a judgment rendered by the district court of Lamar County, in favor of appellee. The appellant sued appellee to recover for personal injuries inflicted upon her by one Beatis, in shooting at an unmuzzled dog, in the attempted enforcement of an ordinance of the city of Paris forbidding dogs to run at large.

The correctness of the action of the trial court in sustaining a general demurrer to the plaintiff's petition is the only question to be determined.

This petition, as stated by appellant, alleged the incorporation of the city under the general incorporation act of the state of Texas, being title 17 of the Revised Statutes, entitled "Cities and Towns"; that the city had power, by its charter, to appoint policemen, prescribe their duties and compensation, and discontinue and remove any such policeman at the pleasure of the city council; that the city also, by its charter, had the power to tax, regulate, or restrain and prohibit the running

at large of dogs, and to authorize their destruction when at large contrary to ordinance; that in July, 1888, the said city, by and through its city council, passed an ordinance prohibiting thereafter the running at large of dogs without being muzzled, within its corporate limits, between the 1st of July and the 20th of September of each year, and requiring and making it the duty of the city marshal and any policeman to kill any such dog when found so running at large; that said city, by and through the city council, employed and appointed one Thomas Beatis to kill dogs under said ordinance, agreeing to pay him a certain stipulated sum per month for his services, the said Beatis then being in the employ and subject to the orders of the city; that at the time and after the passage of said ordinance, the said city, acting by and through the city council, made it the duty of and ordered the said Beatis to go upon the public streets, alleys, and highways of the city, and kill all dogs found running at large without being muzzled; that about the 24th of August, 1888, while the said Beatis was in the employ and service of the city, and acting in the scope of his employment, and while executing and carrying out the express orders and commands of the city in killing a dog running at large without a muzzle on one of the streets of the city, he, the said Beatis, recklessly, negligently, and carelessly shot off, discharged, and fired a double-barrel shotgun, loaded with powder and shot (the shot being of the denomination commonly called large goose-shot), on and along one of the most public streets in the city, where people were and are constantly passing in the discharge of the duties of their various avocations; that the said Beatis, in so negligently, carelessly, and recklessly shooting on and along said public street, in carrying out the orders of the city, as aforesaid, inflicted upon plaintiff two painful and serious wounds. Then follow the allegations as to the plaintiff's injuries, suffering, and loss.

The enactment of the ordinance referred to in the petition was an exercise, by the city, of its police power. Its purpose was to secure the safety, health, and welfare of the public. Beatis, the man whose act was complained of, was not, therefore, a mere servant or employee, though the petition so denominates him. He occupied the attitude of a policeman engaged in the enforcement of an ordinance of the city. In such a case, the maxim *respondeat superior* does not apply. Where a city acts as the agent of the state, it becomes the

representative of sovereignty. It is not acting in the management of its private or corporate concerns, but in the interest of the public, and as the guardian of the health, peace, convenience, and welfare of the public. Under such circumstances, it is not liable for the acts of its officers or employees engaged in the execution of its ordinances: 2 Dillon on Municipal Corporations, sec. 975; *Culver v. City of Streator*, 130 Ill. 238, and the numerous authorities there cited; *Harrison v. Columbus*, 44 Tex. 418; *Keller v. Corpus Christi*, 50 Tex. 614; 32 Am. Rep. 613; *Conway v. Beaumont*, 61 Tex. 12; *Galveston v. Posnainsky*, 62 Tex. 180; 50 Am. Rep. 517; *Corricana v. White*, 57 Tex. 382.

The judgment should be affirmed.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OR WRONGFUL ACTS OF OFFICERS, AGENTS, OR SERVANTS. — For an exhaustive discussion of this subject, see elaborate note to *Goddard v. Harpwell*, 30 Am. St. Rep. 276. A municipal corporation is not liable for injuries resulting from the negligent driving of a hose-reel on its way to a fire, though the fire department is under the management of the city, and the driver is in its employ: *Alexander v. Ficksburg*, 68 Miss. 564. As to the powers and functions of a municipal corporation of a governmental nature, it is not liable for damages caused by the wrongful acts or negligence of its officers or servants: *Brown v. Gundersotte*, 24 W. Va. 299; see also *Bronson v. Washington*, 57 Conn. 346.

SWEENEY v. GULF, COLORADO, AND SANTA FE RAILWAY COMPANY.

[32 TEXAS, 422.]

RAILROAD COMPANIES — SECTION-FOREMAN AS VICE-PRINCIPAL. — A railway section-foreman, having power to control, employ, and discharge the men under him, occupies the position of vice-principal as to them, in so far as they are affected by his acts. He is the representative of the railway company in the performance of any act, service, or duty in the line of his employment, and no distinction can be drawn between the performance of those higher duties intrusted to him specially, and those of an ordinary character, which both he and the subordinate servants under him are in the habit of indiscriminately performing.

MASTER AND SERVANT — LIABILITY OF MASTER FOR ACT OF VICE-PRINCIPAL. — When a subordinate employee is injured through the negligence of a vice-principal, the master is liable in the same manner as if he had been personally present and committed the negligent act himself.

RAILROAD COMPANIES — LIABILITY FOR NEGLIGENCE OF VICE-PRINCIPAL. — A railway section-foreman, having power to control, employ, and discharge the men under him, is a vice-principal, and not a fellow-servant

with them, and the railway company is liable for his negligent act in throwing back an open switch, whereby one of the men under his control is injured.

G. G. Randell, for the appellant.

J. W. Terry, for the appellee.

MARR, J., Section A. "The appellant, as plaintiff below, brought this suit on the nineteenth day of April, 1889, against appellee, defendant below, to recover damages for personal injuries to appellant to the amount of twenty thousand dollars, sustained by appellant while in the employ of appellee as section-hand on appellee's railway, on the twenty-ninth day of August, 1888, in the city of Gainesville, Cooke County, Texas, said injuries being caused by the gross carelessness and negligence of appellee, through its agent James Murphy, section-foreman."

The court decided the case in favor of the defendant, upon the ground that said Murphy and the plaintiff were fellow-servants of a common master in reference to the particular acts which were negligently performed by Murphy and caused the injury to the plaintiff. Murphy was the foreman of the section "gang," and he had been invested by the defendant with authority to employ and discharge the employees in his "gang." The plaintiff was one of these, and was working under him, and subject to his orders, at the time when he received the injuries, on account of the negligence of said foreman, of which complaint is made in this suit.

It appears that upon the day of the injury Murphy and some of the employees upon one hand-car, and the plaintiff and other employees upon another hand-car, were all going to a certain point on defendant's road, "where they were to work that day," Murphy's car being in advance. Arriving at a switch, Murphy dismounted, "in order to throw the switch, so that the hand-cars might pass onto the main line of the road." The "first hand-car passed safely, but as the second car (the one upon which the plaintiff was riding) was entering upon the main line, and before it had cleared the switch, said Murphy threw the switch back, thereby causing the said hand-car to jump the track, and causing the handle of the car to strike plaintiff and throw him violently upon the ground. Plaintiff was guilty of no negligence, but Murphy was guilty of negligence in throwing the switch," as before indicated.

The above summary is taken from the judge's findings of

facts, and it is not controverted that the evidence amply supports the findings. The court further found that the plaintiff had been damaged, on account of the injuries, in the sum of \$750; and the judge says "that if, in my judgment, the defendant was liable for the injuries sustained by the plaintiff, I would render judgment for him for \$750"; but as Murphy, in his opinion, "in throwing the switch, was acting in the capacity of a fellow-servant and co-laborer of the plaintiff" (which he finds as a matter of fact and of law), he therefore rendered judgment in favor of the defendant. In the conclusions of fact, the court below furthermore says: "In throwing said switch, said Murphy was not acting in the line of his duty as section-foreman. He was not performing a duty delegated to him as section-foreman. It is customary and usual, on defendant's line of road, for switches to be thrown by any of the employees of the road indiscriminately, or by the section-foreman, just as convenience might suggest, the section-foreman throwing switches when more convenient for him to do so than for some of the other hands, and *vice versa*. In throwing the switch which caused the injury to plaintiff, said Murphy was acting as a fellow-servant and co-laborer of plaintiff, and in no other capacity."

The plaintiff has appealed, assigned errors in the findings of the court below, and asks that the judgment be reversed, and rendered in his favor. There is sufficient evidence in the record to sustain the findings of fact of the court below as above set forth; but we think that whether Murphy should be regarded as a vice-principal of the defendant, or a mere fellow-servant of the plaintiff, at the time of the injury, and in the performance of the act which caused the injury, is a question of law to be determined from the facts of the case. The doctrine relied upon by the appellee to support the judgment of the court below—that a vice-principal, or *alter ego*, of the master should only be considered as occupying that relation in reference to those non-assignable duties of the master which the law devolves upon him, such as employing competent servants and providing suitable machinery, etc.—seems to have been expressly repudiated by the courts of this state: *Missouri Pac. R'y Co. v. Williams*, 75 Tex. 4; 16 Am. St. Rep. 887; *Galveston etc. R'y Co. v. Smith*, 76 Tex. 611; 18 Am. St. Rep. 78; *Nix v. Texas Pac. R'y Co.*, 82 Tex. 478; 27 Am. St. Rep. 897. The weight of the authorities elsewhere may support this doctrine, and in the case of *Galveston etc. R'y Co. v.*

Farmer, 73 Tex. 85, there are expressions used in the opinion which seem to recognize the correctness of the rule now contended for by the appellee's counsel, but the point was not decided by the court: Bishop on Non-Contract Law, secs. 661-665, and cases cited; *Chicago etc. R. R. Co. v. May*, 108 Ill. 288. Upon the direct authority of the decision in *Missouri Pac. R'y Co. v. Williams*, 75 Tex. 4, 16 Am. St. Rep. 867, there can be no doubt that Murphy was a vice-principal of the defendant, and not the fellow-servant of the plaintiff. Such relation being established, the three cases first cited as adopted by the supreme court lead to the conclusion that Murphy should be held to have been the representative of the defendant in the performance of any act, service, or duty for the defendant in the line of his employment, and that no distinction should be drawn between the performance of those higher duties intrusted to him specially, and those of an ordinary character, which both he and the subordinate servants and employees under him were in the habit of indiscriminately performing. In other words, when he negligently injured the plaintiff, the law viewed his act in the same light as if the master had been personally present and committed the negligent act himself; and in the latter contingency, no one would doubt the liability of the master.

The rule upon the subject, and the reasons for the rule as adopted in this state, will be found to have been expounded and explained by Judge Gaines in delivering the opinion of the court in *Missouri Pac. R'y Co. v. Williams*, 75 Tex. 4, 16 Am. St. Rep. 867, and we need not quote the language.

In Nix's case, cited above, the attempt was made by the railway company to limit, in effect, the powers of the vice principal to the "non-assignable duties," but the position was not sustained by this court nor the supreme court. The decision in Williams's case was reaffirmed, and attention was pointedly called to the fact that the supreme court had but partially adopted the opinion of the commission in the case of *Galveston etc. R'y Co. v. Smith*, 76 Tex. 618; 18 Am. St. Rep. 78.

In this state of the authorities in Texas, we do not think that the question in hand should be treated as an original one. We feel bound by the foregoing decisions, and therefore hold that the court below erred in denying the liability of the defendant for the negligence of Murphy under the facts in evidence, upon the ground that he was a mere "co-laborer and

fellow-servant of the plaintiff." Nothing remains to be done, in this view of the case, but to reverse the judgment, and render one in favor of the plaintiff, as there is no controversy about the fact of negligence and the amount of the damages as fixed by the district court.

We think, therefore, that the judgment should be reversed, and here rendered in favor of the appellant, against the appellee, for the sum of \$750, and all costs of this suit, for all of which execution may issue as the law directs, etc.

MASTER AND SERVANT — FOREMAN OF RAILROAD LABORERS, WHETHER VICE-PRINCIPAL OR FELLOW-SERVANT. — A foreman having charge of laborers engaged in removing a railroad company's building is a vice-principal of the company, and not a fellow-servant of the laborers: *Sullivan v. Hannibal etc. R. R. Co.*, 107 Mo. 66; 28 Am. St. Rep. 389, and note with cases discussing this subject collected; *Colorado etc. Ry Co. v. O'Brien*, 16 Col. 219.

MASTER AND SERVANT — LIABILITY OF MASTER FOR NEGLIGENCE OF VICE-PRINCIPAL. — A master cannot, by delegating the performance of his duties to another, relieve himself from liability for injuries resulting from the negligence of his vice-principal in the exercise of such duties, but must respond in damages for them: *McElligott v. Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181, and note; *Sullivan v. Hannibal etc. R. R. Co.*, 107 Mo. 66; 28 Am. St. Rep. 388, and note; *International etc. Ry Co. v. Prince*, 77 Tex. 560; 19 Am. St. Rep. 795; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180, and note; *Miller v. Southern Pacific Co.*, 20 Or. 285. See extended note to *Adams v. Iron Cliffs Co.*, 18 Am. St. Rep. 455.

BELO v. FULLER.

[84 TEXAS, 450.]

LIBEL. — ALL PERSONS ARE LIABLE WHO ENGAGE IN PUBLISHING OR CIRCULATING a libel; and by reason of the doctrine of the several liability of tort-feasors, the remedy may be pursued against one or more of those guilty of the wrong.

LIBEL — LIABILITY OF CORPORATION. — A corporation is civilly liable for a libel; and if it publishes and circulates a libel by the aid and assistance of others, all are equally liable in a civil action, either jointly or severally.

LIBEL. — LIABILITY OF MEMBERS OF CORPORATION for a libel published by it does not arise from the fact that they are share-holders or members alone, but springs only from their active agency in producing and circulating the libel.

LIBEL BY CORPORATION — LIABILITY OF STOCKHOLDERS. — When a libel is published and circulated by a newspaper corporation, its stockholders and officers are not liable from the mere fact of their membership therein. To render them responsible for such libel, it must also be shown that they in some way aided, assisted, and advised its publication

or circulation, or that their duties to the corporation are of such character and nature as to charge them with the performance of functions concerning the publication or circulation of the paper, whereby they knew, or should have known, of the publication or circulation of such libel.

LIBEL. — WORDS WHICH IMPLY GUILT OF CRIME punishable with imprisonment are actionable *per se*, without making the charge in express terms. They are actionable if they consist of a statement of facts which would naturally and presumably be understood by the hearers or readers as a charge of such crime.

LIBEL — WORDS ACTIONABLE PER SE. — A newspaper publication falsely stating that a certain person or persons "were arrested and lodged in jail to-day, on charge of theft," is libelous, and actionable *per se*.

LIBEL — ACTUAL DAMAGES RECOVERABLE WITHOUT PROOF OF MALICE. — When defamatory and libelous words charge an actionable crime, actual damages, including mental suffering and loss of character, are recoverable, even in the absence of malice.

LIBEL — PRESUMPTION OF INJURY. — It is presumed, without proof of damage, that the unauthorized publication of actionable words charging an infamous crime injures the character, reputation, and mental feelings of the party against whom the libel is directed.

Summerlin and Wise, and L. N. Walthall, for the appellants.

FISHER, J., Section B. This is a suit by appellee against A. H. Belo, J. J. Hand, and D. C. Jenkins, composing the firm of A. H. Belo & Co., to recover damages for a libel alleged to have been published and circulated by A. H. Belo & Co., in the Galveston News, on the tenth day of February, 1887. Defendants answered, alleging, in substance, that A. H. Belo & Co. was a corporation at the time of said publication, and that the individuals sued were not personally liable for the acts of the corporation; that the libelous matter was retracted; that they entertained no malice toward the plaintiff, and that said publication was innocently made, under a mistake; that the words were not actionable, and that plaintiff has sustained no damages. The death of Hand was suggested, and the case as to him dismissed. Judgment was rendered in favor of appellee against A. H. Belo and D. C. Jenkins for the sum of five hundred dollars and costs of suit.

It is here contended that it was error to render judgment against A. H. Belo and D. C. Jenkins, because they were not parties to the publication and circulation of the alleged libel, but that it was the act of A. H. Belo & Co., a corporation.

All persons engaged in publishing and circulating a libel are responsible therefor; and by reason of the doctrine of the several liability of tort-feasors, the remedy may be pursued against one or more of those guilty of the wrong. It was evidently the supposed application of this principle of law that

influenced the trial court in submitting this case to the jury and in permitting a recovery to be had against the appellants. It is the law in this state that a corporation may be civilly responsible for libel: *Missouri Pac. R'y Co. v. Richmond*, 78 Tex. 572; 15 Am. St. Rep. 794. If a corporation publishes and circulates a libel by the aid and assistance of others, they are equally guilty, and will be held liable, either jointly or severally, as the pleader may elect. Their liability does not grow out of the fact that they are stockholders or members of the corporation, but springs from their active agency in producing and circulating the libel. It is the corporation that is the publisher, and not the persons constituting its membership. Simply to show that persons are stockholders and officers of the publishing corporation will not make them responsible for libelous publications appearing in the paper, unless it is shown that they in some way aided and assisted and advised its publication or circulation, or unless their duties as officers of the concern were of such character as charges them with the performance of functions concerning the publication and circulation of the paper,—such duties being of such a nature that the law would imply that such officer knew or should have known of the publication of such libelous matter. Applying these principles to the facts of this case, we find the evidence fails to connect either of the appellants with the publication or circulation of the paper containing the libel, or that their duties as members or officers of the corporation were of such character that the law would impute to them an agency in its publication or circulation. For this reason, we reverse this case.

In view of another trial, we will briefly notice some of the questions presented in the remaining assignments. This is the libel complained of: "Gregorio Narvalle and Joe Fuller, a hack-driver, were arrested and lodged in jail to-day, on charge of theft."

It is insisted by appellant "that these words are not in themselves actionable; and the evidence showing no malice or special injury, that appellee was not entitled to recover, and that the only element of actual damages shown is mental suffering, and that recovery cannot be had alone for such damages."

Words which impute that the plaintiff has been guilty of a crime punishable with imprisonment are actionable *per se*. It is not necessary that the words, to be actionable *per se*, should

make the charge in express terms. They are actionable if they consist of a statement of facts which would naturally and presumably be understood by the hearers as a charge of crime: 13 Am. & Eng. Ency. of Law, 347-353. We are of opinion that the words charge an actionable crime. If the defamatory words charge an actionable crime, and it is shown that there is in fact an entire absence of malice, actual damages are nevertheless recoverable to the extent that will compensate the party for his injuries: Cooley on Torts, sec. 209; *Republican Pub. Co. v. Mosman*, 15 Col. 399; 3 Sutherland on Damages, 642. When the nature of the charge is actionable, as in this case, the law will assume, if the publication is unauthorized, that the plaintiff has been injured in his character and feelings; and evidence of damages in this respect is not required, as the law will presume that such loss resulted: 3 Sutherland on Damages, 642, 643, 645, 646, 668, 669; 13 Am. & Eng. Ency. of Law, 490; *Boldt v. Budwig*, 19 Neb. 744; *Chesley v. Thompson*, 137 Mass. 137; *Marble v. Chapin*, 132 Mass. 226; *Mahoney v. Belford*, 132 Mass. 393.

We are not required, in this case, to decide whether plaintiff can recover damages on evidence alone showing mental suffering. The effect of the libel in charging an actionable crime upon the character and reputation of the plaintiff constitutes one of the principal elements of damages that the law recognizes are recoverable in all cases where the publication is unauthorized. This is upon the theory that the recovery is given in pecuniary satisfaction for the loss of character and reputation. Considering this one of the elements of compensatory damages that are recoverable, we think it is permissible to consider, in connection therewith, as a proper item of damages, the injured feelings of the party resulting from such publication. But, in this connection, the appellant contends that it is shown by the testimony of appellee that he suffered no loss to his character or reputation by reason of the libel. We do not so construe the evidence. But if susceptible of this construction, we do not believe the law will permit the evidence to have the effect contended for. The presumption of the law is, that the unauthorized publication of actionable words charging an infamous crime injures the character and reputation of the party against whom the libel is directed. This presumption that the law creates cannot be dispelled simply by the opinion of the party that it does not exist in his case. Injuries resulting to

his character and feelings need not be proved, in order to permit a recovery. Such injuries are presumed.

We think there was error in permitting the witness to testify as to what occurred between the appellee and the witness Garrett. It was no part of the *res gestæ*, and was an occurrence that had no connection with Garrett's duties as agent for appellants.

The conduct of counsel, in his argument to the jury in referring to the case of *Belo v. Wren*, 63 Tex. 686, and his remarks in connection therewith, were not justified by the evidence, and were extremely reprehensible, and should not have been permitted by the court.

The error in the verdict will not likely occur in another trial.

We conclude the case should be reversed, and so report it.

LIBEL — PARTIES DEFENDANT IN ACTIONS FOR: See extended note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333. An action for libel may be maintained against two, if the offense be a joint act of both: *Harris v. Huntington*, 2 Tyler, 129; 4 Am. Dec. 728; extended note to *Aldrich v. Press Printing Co.*, 86 Am. Dec. 89.

LIBEL — LIABILITY OF CORPORATION FOR. — A corporation may become civilly liable in damages for libel: *Missouri Pac. R'y Co. v. Richmond*, 73 Tex. 563; 15 Am. St. Rep. 794, and note; *Evening Journal Ass'n v. McDermott*, 44 N. J. L. 430; 43 Am. Rep. 392; *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539; 27 Am. Rep. 293; *Aldrich v. Press Printing Co.*, 9 Minn. 133; 86 Am. Dec. 84, and extended note. *Allen v. News Pub. Co.*, 81 Wis. 120, declares that the malice of the editor of a newspaper in composing a libelous article for publication is the malice of the corporation owning and publishing the paper, and holds the corporation liable therefor.

LIBEL — PUBLICATION CHARGING CRIME. — A newspaper publication charging that a jury have perjured themselves in rendering a verdict is libelous: *Weich v. Tribune Pub. Co.*, 83 Mich. 661; 21 Am. St. Rep. 629, and note. A party cannot be subjected to the wrong and outrage of a false publication of his arrest and imprisonment looking toward his guilt, without a remedy: *McAllister v. Detroit Free Press Co.*, 76 Mich. 338; 15 Am. St. Rep. 318, and extended note. The words of a publication may be true, yet if the sense of the publication is to impute a crime, it is libelous: *Democrat Pub. Co. v. Jones*, 83 Tex. 302. When a man is charged, in a newspaper, with doing what, if done by him, can be nothing else but a crime, it cannot be said not to involve a criminal charge because other persons might not be so guilty: *Park v. Detroit Free Press Co.*, 72 Mich. 560; 16 Am. St. Rep. 544.

LIBEL — DAMAGES RECOVERABLE FOR. — For a full discussion of this subject, see extended notes to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 339, and *Tervilliger v. Wands*, 72 Am. Dec. 426. In the absence of an allegation of special damages in libel, the plaintiff can recover such damages as are the natural result of the libelous publication upon his character, reputation, and feelings: *McDuff v. Detroit etc. Journal Co.*, 84 Mich. 1; 22 Am. St. Rep. 673; *Stewart v. Minnesota Tribune Co.*, 40 Minn. 101; 12 Am. St.

Rep. 696. Where the libel is not actionable *per se*, mental anguish cannot be allowed as a part of the damage, without proof of some other injury: *Hirshfield v. Fort Worth Nat. Bank*, 83 Tex. 452; 29 Am. St. Rep. 660, and note. See *Burt v. Advertiser etc. Co.*, 154 Mass. 238.

LIBEL — PRESUMPTION OF DAMAGE. — From a libelous publication the law implies malice and infers damages: *Byam v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726, and note.

HARDY v. BEATY.

[84 TEXAS, 562.]

JUDGMENTS — CONSTRUCTIVE SERVICE — COLLATERAL ATTACK. — A judgment rendered by a court of competent jurisdiction upon citation by publication is not open to collateral attack on the ground that the affidavit for publication is insufficient.

JUDGMENTS — PRESUMPTION UPON COLLATERAL ATTACK. — In a collateral attack upon a domestic judgment of a court of general jurisdiction, every presumption will be indulged in favor of the jurisdiction of the court and the validity of the judgment; and when it does not otherwise appear, it will be presumed that the court ascertained all facts necessary to the exercise of its jurisdiction. In order for such attack to prevail, it must affirmatively appear that the facts essential to the jurisdiction of the court did not in fact exist.

JUDGMENTS UPON CONSTRUCTIVE SERVICE — PRESUMPTIONS IN FAVOR OF. — Judgments rendered upon constructive service by publication are given the same conclusive effect and are entitled to the same favorable presumptions as judgments upon personal service.

TRESPASS TO TRY TITLE. — The remedy of trespass to try title is broad enough to embrace every character of litigation affecting title to real estate.

TRESPASS TO TRY TITLE — JUDGMENT IN REM — CONSTRUCTIVE SERVICE UPON NON-RESIDENT MINOR. — An action of trespass to try title to an undivided interest in a tract of land is a proceeding *in rem*, and a judgment therein rendered upon service by publication upon a non-resident minor heir is effective to fix the title to the land as between the parties to the action.

JUDGMENTS IN REM AGAINST NON-RESIDENTS UPON CONSTRUCTIVE SERVICE. — A judgment in an action to try title to an undivided interest in land, upon service by publication upon non-resident defendants, is valid, so far as it affects the title to such land.

JUDGMENTS IN PERSONAM AGAINST NON-RESIDENTS BY CONSTRUCTIVE SERVICE. — A judgment against non-residents *in personam* for costs, upon service by publication, in an action to try title to an undivided interest in land, is without jurisdiction, and a sale under it is void.

S. H. Lumpkin, for the appellants.

Gillette and Murrell, and D. H. Hewlett, for the appellees.

FISHER, J., Section B. This suit is for partition of the Joseph L. Wilson 640 acres survey of land, brought by appel-

lants against the unknown heirs of F. H. Alley, and against appellees, J. R. Beaty and A. W. Barfort, February 9, 1889. Thomas Jones and Mary Taylor and her husband, C. W. Taylor, intervened, and disclaimed as to certain lands described in the petition, and set up title to the remainder. Beaty set up exclusive title to 120 acres by metes and bounds, and Barfort to 220 acres out of the south half of the survey, and both disclaimed title to remainder of the survey. Both pleaded the statutes of three, five, and ten years' limitation, and improvements in good faith. As to pleas of limitation, plaintiffs pleaded coverture, and not guilty to plea of intervention. The unknown heirs of Alley, by their guardian *ad litem*, answer, and adopt the allegations of plaintiffs' petition.

Judgment below was rendered, against appellants and the unknown heirs of Alley, in favor of the defendants, and also in favor of interveners for 320 acres of the north half of the survey, and removing plaintiffs' claim as a cloud in the interveners' and defendants' title, and vesting the title to the land in defendants and the interveners.

The plaintiffs and the unknown heirs of Alley assert title to the land as the heirs of Joseph Wilson.

The defendants and the interveners assert and claim title to the land under a judgment rendered in favor of G. W. Outler, against the heirs of Joseph Wilson, in the district court of McLennan County, Texas, June 5, 1856, divesting the heirs of Wilson of an undivided half-interest in the lands, and vesting title thereto in Outler; and also under an execution sale of the interest of the heirs in the land that was sold under an execution for costs incurred in the case of *Outler v. Heirs of Joseph Wilson*. Outler was the purchaser of the undivided half-interest of the Wilson heirs in the land at this execution sale. The defendants and interveners claim under Outler.

The court below instructed the jury as follows: "That if they believed that the plaintiffs are entitled to inherit the estate of Andrew J. Wilson or Joseph Wilson, then they are instructed that the patent deeds and judgment executions and return thereon read in evidence are sufficient to entitle the defendants and the interveners to recover against the plaintiffs and the unknown heirs of F. H. Alley," and instructed them to so find.

On the trial below, appellants objected to the introduction in evidence by the interveners and defendants of the judg-

ment rendered in the case of *Outler v. Heirs of Joseph Wilson*, and to the execution and return and sheriff's deed executed to Outler, for the reasons: 1. Because it affirmatively appears from the said record in cause No. 127 that the district court of McLennan County had no jurisdiction to enter said judgment, for the reason that it appears that the foundation of said suit No. 127 was for specific performance of contract, and not a proceeding *in rem*. 2. Because there was no affidavit made, as shown by said record, to authorize the issuance of citation for publication, as attempted in said cause. 3. Because it appears that the defendants in cause No. 127 were attempted to be cited by publication as unknown non-resident heirs of Joseph Wilson, deceased. 4. Because the said writ of citation for publication was defective, in that it did not give the proper names of the parties to the suit, and because it did not give a brief statement of the cause of action, as required by law, and because said unknown heirs, defendants in cause No. 127, were cited to answer the petition of J. W. Outler instead of G. W. Outler, who appears to be the judgment creditor in said judgment. 5. Because the district court of McLennan County did not have jurisdiction to render a judgment to enforce a specific performance of a contract to convey land against the minor heirs of a decedent. 6. Because the execution under which the land was sold, and the sheriff's deed conveying the land, were void, because the judgment under which said execution was issued did not support or authorize the issuance of execution, and because the sale of the land under the writ of execution was made after the return day of the writ, therefore the sale is void.

The court overruled these objections, and admitted the instruments in evidence.

Giving the charge quoted, and admitting these instruments in evidence, are assigned errors. This presents the principal question involved in the case.

In order to ascertain the merits of these assignments, it becomes necessary to look into the proceeding had in the case of *Outler v. Heirs of Joseph Wilson*. J. W. Outler filed his petition in the district court of McLennan County on the thirteenth day of March, 1854, wherein he alleged, "that Joseph L. Wilson fell at Goliad in 1836, and was thereby entitled to 4,036 acres of land, and that his heir, Joseph Wilson, then a citizen of Alabama, in 1850 entered into a contract with petitioner to go to Texas, and procure the lands for said Joseph

Wilson, and by the terms of the agreement, for and in consideration of the services to be rendered by petitioner in procuring the lands, etc., he was to have one half of the lands, which were to be conveyed to him by Joseph Wilson; that he came to Texas, and by his efforts procured patents for said lands and located the same; that before he returned to Alabama, and after he had procured the lands, the said Joseph Wilson died, thereby rendering it impossible to execute him a title."

The petition asks for judgment against the heirs of Joseph Wilson for one half of the lands, and that title thereto be decreed in him. The petition describes the survey in controversy as one of the tracts of land that the plaintiff Outler sought to recover a half-interest in.

June 5, 1856, judgment was rendered in favor of Outler against the heirs of Joseph Wilson, deceased, for one half of the lands. The judgment does not partition the lands.

The evidence in the record before us shows with reasonable certainty that the appellants are the surviving heirs of Joseph Wilson, and that at the time the petition in the case of *Outler v. Heirs of Wilson* was filed, and at the time the judgment was rendered in that case, the heirs of Wilson were non-residents of this state, and that at such time Andrew J. Wilson, one of the heirs, was a minor.

The following paper is a part of the record in the case of *Outler v. Heirs of Wilson*:—

"The State of Texas, County of McLennan.

"This day personally came and appeared before A. J. Evans, clerk of the district court of said county, and says the names of the heirs of Joseph Wilson, deceased, are unknown to affiant.

A. J. EVANS.

"J. R. HARRIS, D. C. McL. Co., T."

It is contended by appellants that this paper purports to be the only affidavit made in the case as a basis for the citation by publication; and that, as an affidavit, it is insufficient, because it does not appear to be sworn to by any one, or before any officer; and that it is so vague and indefinite as to render it meaningless.

We are of opinion that this paper cannot be regarded as an affidavit sufficient in law for any purpose. It is not sworn to by any one, or before any officer. But placing this construction upon this paper does not determine that the court did

not have jurisdiction to render the judgment. The judgment in the case of *Outler v. Heirs of Wilson* was rendered in a domestic court of general jurisdiction. In such case every presumption will be indulged in favor of the jurisdiction of the court and the validity of the judgment; and where it does not otherwise appear, it will be presumed that the court ascertained all facts necessary to the exercise of its jurisdiction: *Treadway v. Eastburn*, 57 Tex. 211.

In cases of this kind, in order for a collateral attack upon the jurisdiction of the court and the validity of the judgment to prevail, it must affirmatively appear that the facts essential to jurisdiction did not in fact exist. If we discard this paper, found in the record, as an insufficient affidavit, or hold it to be, as we do, no affidavit at all, the judgment must nevertheless stand when collaterally questioned, because the law presumes that a proper affidavit was made, and such presumption will exist until the contrary is affirmatively shown by something contained in the record.

In construing the effect of judgments rendered upon constructive service by publication, this court, in the case of *Stewart v. Anderson*, 70 Tex. 590, held that the same conclusive effect is given to such judgments as those rendered upon personal service; that a like presumption will obtain in the one case as in the other.

We do not intend to hold that an affidavit as a basis for citation by publication is essential or necessary, in order for the jurisdiction of the court to attach. We leave that question open, as unnecessary to be decided. What we do hold is, that as it was not shown that an affidavit was not in fact made, the law will presume that one was made. We do not believe that the citation for publication is subject to the objections urged against it. It states that J. W. Outler has filed his petition praying that he may have certain lands decreed to him which were granted by the state of Texas to the heirs of Joseph L. Wilson, deceased, and that Joseph Wilson agreed to convey to him a certain portion of the lands for having located same; that Joseph Wilson is dead, and his heirs are unknown. This citation was published for the time required by law. While the citation may not be as full as the law requires, it is sufficient, when collaterally questioned. The apparent discrepancy in the name of G. W. and J. W. Outler is removed by an examination of the record in the case. It appears that J. W. and G. W. Outler is the same person.

We next come to the question whether the court had jurisdiction to render the judgment in the case of *Outler v. Heirs of Joseph Wilson*, by reason of the fact that one of the heirs was a minor at the time. The case of *Messner v. Giddings*, 65 Tex. 301, is relied upon by appellants as authority against the jurisdiction of the court. The remedy pursued by Outler against the heirs of Wilson is in no manner like that undertaken in the case of *Messner v. Giddings*, 65 Tex. 301. In the former case, the remedy is one by Outler to recover from the heirs of Wilson lands that he had acquired by virtue of a title from their ancestor. The district court was the forum for this purpose. In the latter case, it was a proceeding had in the district court, seeking to permit the mother of the minor children to have the title of such minors in real estate divested, and vested in another, in pursuance of a contract that she had made but had no power to carry out. There, it was rightfully held that the district court had no jurisdiction. The two cases are widely apart.

Regarding the unknown heirs of Wilson as non-residents of the state when the judgment was rendered in favor of Outler against them, we come to the question whether the court had cognizance of the subject-matter of the suit and had jurisdiction to render the judgment. It is contended by appellants that the remedy pursued and the judgment rendered were *in personam*, and not *in rem*. The law in force at the time the case of *Outler v. Heirs of Wilson* was instituted and judgment rendered permitted the plaintiff to sue in trespass to try title for land, and authorized the issuance of a writ of possession to place him in possession when recovered. In this respect the law was the same then as it is now. The law then, as now, permitted the action to be maintained upon an equitable as well as the legal title.

These provisions of the statutes are so well known that we deem it unnecessary to quote them. They show the purpose of the law to be to provide, by the remedy of trespass to try title, a method of vesting and divesting the title to real estate in all cases where the right, or title, or interest and possession of land may be involved. The remedy was evidently designedly intended as broad enough and effective in its scope to embrace all character of litigation that affected the title to real estate. This being the purpose of the law, we think the remedy pursued by Outler was an adjudication of the title between him and the heirs of Wilson, and fell within the pro-

visions of the law that authorized the action of trespass to try title.

This being true, it is next to be considered whether such an action is one *in rem*. Our opinion upon this question cannot be more satisfactorily expressed than by what is said by the supreme court of the United States in the case of *Arndt v. Griggs*, 134 U. S. 316: "The propositions are, that an action to quiet title is a suit in equity; that equity acts upon the person, and that the person is not brought into court by service of publication alone. While these propositions are doubtless correct as statements of general rules respecting bills to quiet title and proceedings in courts of equity, they are not applicable or controlling here. The question is, not what a court of equity, by virtue of its general powers, and in the absence of a statute, might do, but it is, What jurisdiction has a state over titles to real estate within its limits? and what jurisdiction may it give by statute to its own courts to determine the validity and extent of the claims of non-residents to such real estate? If a state has no power to bring a non-resident into its courts, for any purpose, by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjective to its rules concerning the holding, the transfer, liability to obligations private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits,—its process goes not out beyond its borders,—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in nature. . . . It remains with the state; and as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the constitution, or

against natural justice. . . . The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

Entertaining these views, we hold that the remedy was *in rem*, and that the court had jurisdiction to render the judgment so far as it affected the title to the lands.

We are of opinion that the court below should have sustained the objections to the admission in evidence of the execution, and sheriff's deed thereunder, conveying to Outler one half of the lands.

The execution was for the costs of suit incurred in the case of *Outler v. Heirs of Wilson*. The heirs, at the time, being non-residents of this state, the court only had power to render judgment against them in so far as affecting the title to the lands, but had no jurisdiction to render judgment for costs, or any other judgment that partook of the character *in personam*. The judgment did not support an execution; hence it was void, and the sheriff's deed did not pass any title: *Foots v. Sewall*, 81 Tex. 660; *Taliaferro v. Butler*, 77 Tex. 580; *Freeman v. Alderson*, 119 U. S. 190.

This view of the question renders it unnecessary to pass upon other objections urged to the execution sale.

For the error of the court in admitting the execution and sheriff's deed in evidence, and the charge of the court in respect thereto, we reverse and remand the case.

JUDGMENTS — COLLATERAL ATTACK — PRESUMPTIONS AS TO JURISDICTION.

— A judgment of a court of competent jurisdiction cannot be collaterally impeached, unless the record shows affirmatively want of jurisdiction: *Williams v. Haynes*, 77 Tex. 283; 19 Am. St. Rep. 752, and note. A judgment conclusively establishes the existence of the jurisdictional facts recited by it, so far as collateral proceedings are concerned: *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263. A domestic judgment of a court of general jurisdiction upon a subject-matter within the scope of its power is so conclusive that evidence *alibunde* cannot be received to contradict it: *Wilkerson v. Schoonmaker*, 77 Tex. 615; 19 Am. St. Rep. 803, and note. When the power to ascertain the jurisdictional facts is conferred on the court, and it adjudges jurisdiction in itself, it may not be overcome on collateral attack: *Goodwin*

v. *Sims*, 86 Ala. 102; 11 Am. St. Rep. 21, and note. For an extended discussion of this subject, see note to *Morrill v. Morrill*, 23 Am. St. Rep. 116; also note to *Gould v. Sternberg*, 15 Am. St. Rep. 143.

JUDGMENTS — CONSTRUCTIVE SERVICE — COLLATERAL ATTACK. — When, in an action to foreclose a mortgage against a non-resident defendant, the court acquires jurisdiction over the defendant by service by publication, its decree of foreclosure, and sale thereunder, are not subject to collateral attack for errors: *Taylor v. Coots*, 32 Neb. 30; 29 Am. St. Rep. 426, and note. A recital, in the record of a probate court, that a party, being a non-resident, was notified of an application for the sale of land of a decedent, and of the day set for the hearing, by publication, is conclusive on collateral attack, unless negated by the record itself: *Goodwin v. Sims*, 86 Ala. 102; 11 Am. St. Rep. 21, and note; *Estate of Newman*, 75 Cal. 213; 7 Am. St. Rep. 146. See extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 114, discussing jurisdiction acquired by service of process by publication, and the conclusiveness of judgments rendered thereon.

JUDGMENTS IN REM AGAINST NON-RESIDENTS BY PUBLICATION. — A suit in equity to cancel a deed for fraud is, under the Arkansas statute, a proceeding *in rem*, and may be prosecuted against a non-resident by publication of summons: *McLaughlin v. McCrory*, 55 Ark. 442; 29 Am. St. Rep. 56, and note. An action for divorce is a proceeding *in rem*, so far as it affects the status of the parties and the custody of their minor children; and a service of process by publication on a non-resident defendant is good: *Estate of Newman*, 75 Cal. 213; 7 Am. St. Rep. 146, and note. See extended note to *Alley v. Caspari*, 6 Am. St. Rep. 183. See also *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34, and note.

JUDGMENTS IN PERSONAM AGAINST NON-RESIDENTS. — Jurisdiction to render a personal judgment cannot be obtained against a defendant who does not reside and is not within the state, and upon whom process is not served, except by the publication thereof: *Renier v. Hurlbut*, 81 Wis. 24; 29 Am. St. Rep. 850, and note. A court has no extra-territorial jurisdiction, and a person not domiciled in a state or county cannot be charged *in personam* by adjudication there, unless he is personally served with process: *De Meli v. De Meli*, 120 N. Y. 485; 17 Am. St. Rep. 652, and note.

TRESPASS TO TRY TITLE — SCOPE OF ACTION. — An action of trespass to try title may be sustained for the cutting of a fallen tree, the roots of which still remain in the soil: *Spigener v. Cooner*, 8 Rich. 301; 64 Am. Dec. 755. The statute directing that an action of trespass to try title shall be tried "conformably to the principles of trial by ejectment" was not intended to introduce all the incidents and consequences attached to that form of action at the common law; its object was simply to furnish a mode of procedure to ascertain in whom the right of property resides: *Easterling v. Blythe*, 7 Tex. 210; 56 Am. Dec. 45.

FIRE ASSOCIATION v. FLOURNOY.

[34 TEXAS, 682.]

INSURANCE — CHANGE IN TITLE UNDER CONDITIONAL SALE — ASSIGNMENT OF POLICY. — A change in the possession of insured property without the consent of the insurer, under a contract purporting to be a lease, but in effect a conditional sale, with notice to the insurer of the change of possession, and that the property had been leased, but not of the terms of the contract, prior to his consent to an assignment of the policy, providing that any change in the title, interest, or possession of the insured property, whether by sale, transfer, or conveyance, in whole or in part, should render it void, is such a change in the title to the property as will render the policy void in the hands of such assignee with notice of the terms of the contract of conditional sale.

INSURANCE — ASSIGNMENT OF POLICY — NEW CONTRACT. — The consent of the insurer to an assignment of a policy creates a new contract on his part, when there has been a prior forfeiture, only when the assignee is ignorant of such forfeiture, or of the facts from which it resulted.

Leake, Shepard, and Miller, for the appellant.

Potter, Potter, and Eddleman, for the appellee.

FISHER, J., Section B. January 8, 1889, appellee instituted this suit against appellant upon a policy of insurance issued by appellant to Brady Brothers, December 21, 1887, and running one year from date, for one thousand dollars, covering certain household furniture and property in a building used as a hotel in the city of Gainesville. October 1, 1888, the policy was, by consent of appellant's agent, assigned to appellee by Brady Brothers. The property was destroyed by fire, October 20, 1888.

The appellant, with other issues presented in its answer, pleaded that the policy sued on contained a stipulation to the effect "that if any change takes place in the title, interest, or possession of the property, except by reason of the death of the assured, whether by the sale, transfer, or conveyance, in whole or in part, the policy shall become void," and that, in violation of such stipulation, Brady Brothers, about January 31, 1888, without the consent of appellant, transferred the property covered by the policy to a firm composed of Tinkle and Black, who immediately took possession of the property, and that when the policy was assigned to appellee by Brady Brothers with the consent of appellant, it did not know that the said Brady Brothers had sold or contracted to sell the property covered by the policy to Tinkle and Black; that by reason of the breach of such condition in the policy, it is void.

Appellee, in reply to these averments in the answer, alleges "that the property was not sold or transferred to Tinkle and Black by Brady Brothers, but that it was simply leased to them, and that Tinkle and Black did not claim to own any interest in said property; that the appellant, at the time of the transfer of the policy to appellee, and before, had full notice and knowledge of the fact of such lease, and consented to the assignment thereof with full knowledge of the lease."

The court below rendered judgment in favor of appellee for the full amount of the policy.

The first assignment of errors complains of the following charge given by the trial court: "'But if you shall believe from the evidence that the defendant, or its agents, C. H. Wood & Co., knew of the terms of said agreement or contract between Brady Brothers and Tinkle and Black, and made no objection to the same, but permitted Brady Brothers and the plaintiff to continue said policy in force, and did any act calculated to induce the belief that it consented to such change, then the defendant would not be permitted to claim an avoidance of the policy sued on,'—because the said charge is not applicable to the evidence before the jury, there being no evidence whatever that the defendant or its agents had any notice of the terms of said contract, or that it did any act calculated to induce a belief that it consented to a change in the title of the insured property."

It appears from the evidence that on the thirty-first day of January, 1888, Brady Brothers and Tinkle and Black entered into a written contract, in consideration of four hundred dollars paid to Brady Brothers, and other payments to be made by Tinkle and Black, whereby Brady Brothers leased to Tinkle and Black, for the term of three years commencing February 1, 1888, all the property covered by the policy. The agreement states the time and amount of each subsequent payment, and contains this stipulation: "It is further hereby expressly understood and agreed by and between the parties to this contract, that should the party of the second part, on or before November 3, 1888, pay to the party of the first part an additional sum of \$26.85, then and in that case the party of the first part doth hereby sell, transfer, and convey unto the party of the second part the absolute title and ownership of all of said furniture and property."

By the terms of the policy it is provided "that if any change takes place in the title, interest, or possession of the property,

except in case of succession by reason of the death of the assured, whether by sale, transfer, or conveyance, in whole or in part," etc., it shall become void.

The court instructed the jury that the contract between Brady Brothers and Tinkle and Black created a change in the title to the property. We think this a proper construction of the contract: *East Texas F. Ins. Co. v. Clarke*, 79 Tex. 24; *Smith v. Phoenix Ins. Co.*, Cal., March 10, 1890; 23 Pac. Rep. 384. Although the contract rendered the policy void, the appellee contends that appellant is estopped from asserting such fact, because it knew of the change of possession of the property and the terms of the contract when it assented to the transfer of the policy to appellee.

The evidence shows that the contract was not recorded; and it further appears that at the time the policy was assigned to appellee, and consented thereto by appellant, it, through its agents, had notice and knowledge of the fact that there was a change in the possession of the property, and that the same was in the possession of Tinkle and Black, and it had been informed that Tinkle and Black held the property under a lease from Brady Brothers. The instrument creating the lease was never exhibited to any of the agents of appellant, nor were the terms and conditions stated to them. The evidence does not show that any such agents knew of the terms of the contract creating a conditional sale of the property to Tinkle and Black. They received no information as to this stipulation in the contract. Appellee seeks to avoid the effect of the want of notice upon the part of the agents of appellant of that part of the contract that creates a conditional sale, by contending, —1. That the evidence shows that the parties to the contract simply intended it to operate as a lease, and that it was not intended that any title to the property should pass by virtue of the contract, and that appellant having notice of the lease, the estoppel would operate; 2. That although the contract may in part create a conditional sale of the property, the appellant, having notice that the property was held under a contract of lease, is chargeable with notice of all the terms and conditions of the contract entered into between the parties; that notice of the existence of the contract of lease puts appellant upon inquiry as to the stipulations creating the conditional sale.

We think that neither of these positions is tenable. There is not, about this contract, any ambiguity or uncertainty that

requires explanation. It, in unequivocal terms, transfers the property therein described to Tinkle and Black, upon their complying with certain conditions concerning the terms of sale. The legal effect of this instrument declares its purpose; and in a controversy between the parties to the contract, were its terms sought to be enforced, the law would not permit parol evidence to give it a different effect than its terms import. Further, upon this point, we think the evidence shows that the parties understood that if Tinkle and Black complied with the contract and made the payments agreed upon, they would become the owners of the property. This, we think, is a fair construction of the entire evidence offered by the witnesses upon this subject.

The fact that the appellant was informed of the existence of the lease would not put it upon inquiry to ascertain the existence of another right or interest that the lessees may have in the property. The only effect of this information would be to put appellant upon notice of the existence of the lease, and of all the terms and conditions necessary and usual contained in instruments creating such estates. He would not be expected to examine such an instrument to ascertain if it passed fee-simple or conditional title to the property described. Where the party states and names the right under which he holds, such information will not excite inquiry as to any other or different right: *Dickey v. Henarie*, 15 Or. 351. We do not believe that the facts justified the charge complained of, and for this reason we reverse and remand the case.

Appellee insists that the consent, by appellant, to the transfer of the policy was a waiver of any prior forfeiture of the policy by reason of the contract between Brady Brothers and Tinkle and Black, and that such consent created a new obligation to the assignee.

Without deciding whether the consent by the insurance company to the transfer of the policy constitutes within itself a sufficient consideration for a promise creating a new obligation, and without deciding what would be the effect of the consent to the assignment of the policy in creating a new obligation upon the part of the insurance company, we do not think that the facts bring this case within the reason of the rule announced in those cases that regard such consent as creating a new obligation upon the part of the insurance company. *Ellis v. Insurance Co.*, 32 Fed. Rep. 646, and other cases

that hold that such consent to the transfer of the policy creates a new obligation with the insurance company, where there has been a previous forfeiture, rest upon the ground that the assignee was ignorant of the forfeiture or the facts from which the forfeiture resulted. Such is not the case here. It appears that Brady Brothers, at the time the policy was assigned, also transferred to appellee, by a written indorsement on the contract, all his right and interest in the contract. This transfer of the contract and property therein described to appellee was effected by Tinkle as the agent of appellee. Tinkle also, as the agent of appellee, obtained a transfer of the policy to appellee and the consent of the insurance company thereto. Tinkle, when acting as the agent of appellee in these matters, had actual knowledge of the tenor of the contract between Brady Brothers and Tinkle and Black, and of the forfeiture and facts that occasioned it. The knowledge and notice of Tinkle, under the circumstances, is chargeable to appellee.

We conclude the case should be reversed and remanded, and so report it.

INSURANCE — CHANGE OF TITLE UNDER CONDITIONAL SALE. — A conditional sale of insured property suspends the risk during the existence of the condition, under a policy which provides against a transfer of title: *Power v. Ocean Ins. Co.*, 19 La. 28; 36 Am. Dec. 665, and note. A fire insurance policy conditioned to be void upon a sale of the premises is avoided by a contract of sale under which the proposed purchaser takes possession: *Davidson v. Hawkeye Ins. Co.*, 71 Iowa, 532; 60 Am. Rep. 818. But in *Washington etc. Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149, it was held that an executory contract for the sale of the premises did not violate a prohibition in the policy against sale or assignment. As to what are violations of conditions against change of title in insurance policies, see extended note to *Morrison v. Tennessee etc. Ins. Co.*, 59 Am. Dec. 304; and extended note to *Lane v. Maine etc. Ins. Co.*, 28 Am. Dec. 154.

INSURANCE — ASSIGNMENT OF POLICY — RIGHTS OF ASSIGNEE UNDER VOID POLICY. — The mere assent of the insurers to the assignment of a policy of insurance gives no force and vitality to the policy which was void before in the hands of the assignors: *Citizens' etc. Ins. Co. v. Doll*, 35 Md. 89; 6 Am. Rep. 360. When a policy has been rendered voidable by the encumbrance of the property, and the company, without knowledge of the encumbrance, consents to an assignment, the assignee cannot recover: *Ellis v. State Ins. Co.*, 63 Iowa, 578; 56 Am. Rep. 865. The assignee of an insurance policy, under an assignment made after a loss has occurred, stands in the shoes of the assignor, and takes it subject to any forfeiture incurred by a violation of its conditions by the assignors: *Bonafant v. American etc. Ins. Co.*, 76 Mich. 553; *Pupke v. Resolute etc. Ins. Co.*, 17 Wis. 378; 84 Am. Dec. 754; *Hale v. Mechanics' etc. Ins. Co.*, 6 Gray, 169; 66 Am. Dec. 410, and note. See extended note to *New York etc. Ins. Co. v. Plack*, 56 Am. Dec. 747, discussing assignments of insurance policies.

CASES
IN THE
SUPREME COURT
OF
WYOMING.

IN RE WRIGHT.

[3 WYOMING, 478.]

CONFLICT OF LAWS — PROSECUTIONS, UNDER WHICH LAW TO BE CONDUCTED.

— A statute declaring that no grand jury shall hereafter be summoned or required to attend the sittings of any district court, unless ordered by the judge thereof, and providing for prosecutions by indictment, applies to the prosecution of crimes alleged to have been committed prior to its enactment.

CONSTITUTIONAL LAW. — PROSECUTION BY INFORMATION, instead of by indictment, is not a denial of due process of law.

LAWS ARE EX POST FACTO if they make an act criminal which, when it was committed, was innocent, or aggravate a crime and make it greater than when committed, or change the punishment and make it greater than that annexed to the crime when committed, or alter the rules of evidence so as to receive less or different testimony than that required at time of the commission of the offense charged, or otherwise alter the situation of the accused to his disadvantage.

LAWS, EX POST FACTO. — SO FAR AS MERE MODES OF PROCEDURE are concerned, a party has no more right in a criminal than in a civil action to insist that his cause be disposed of under the law in force when the act to be investigated is charged to have taken place.

CONSTITUTIONAL LAW — EX POST FACTO LAWS. — A statute changing the number of the grand jury in all cases, and authorizing a prosecution by information as well as by indictment, does not alter the situation of an accused to his disadvantage, and therefore is applicable to the prosecution of a crime alleged to have been committed before its passage, if the constitution of the state, adopted before the doing of the criminal act, declared that the legislature may change, regulate, or abolish the grand jury system, and that, until otherwise provided for by law, no person shall, for a felony, be proceeded against criminally otherwise than by indictment.

HABEAS CORPUS — UNCONSTITUTIONALITY OF STATUTE. — If a prisoner claims that the statute under which he was convicted was unconstitutional, and therefore void, that question may be considered and determined upon *habeas corpus*.

Donselmann and Van Orsdel, for the petitioner.

Charles N. Potter, attorney-general, for the state.

GROESBECK, C. J. This is a hearing upon the demurrer to the answer and return of A. D. Kelley, sheriff of Laramie County, to the petition for the writ of *habeas corpus*, and to the writ. It is admitted that the demurrer raises all the questions involved, and that the decision upon it will dispose of the entire case. The answer and return of the sheriff show that the petitioner, Leonard Wright, is restrained of his liberty, by the said sheriff, in the jail of said Laramie County, under a sentence of the district court of said county, for the term of two years and six months, under his plea of guilty of an assault with an attempt to commit rape. The defendant was informed against by the county and prosecuting attorney of said county for the crime of rape, under the provisions of the law passed by the first legislature of the state of Wyoming, approved January 10, 1891, entitled "An act to change and regulate the grand jury system by reducing the number of grand jurors, providing that a grand jury shall be summoned only when ordered by the court, and providing for the prosecution by information, and the procedure thereunder": Wyo. Sess. Laws, 1890-91, c. 59, p. 213. The offense is charged in the information as having occurred on the sixteenth day of December, A. D. 1890, nearly a month before the act took effect; and the counsel for the petitioner claim that the petitioner, notwithstanding his plea of guilty, should be proceeded against by indictment, instead of by information, as, prior to the passage of the act above named, he could only have been accused by indictment. It is urged that the petitioner is held without due process of law, and that the law applying to the prosecution of offenses committed prior to its enactment is an *ex post facto* law, and in violation of section 25 of the declaration of rights (Wyo. Const., art. 1), which states that "no *ex post facto* law, nor any law impairing the obligation of contracts, shall ever be made." The constitutional authority for the enactment of the statute is found in said article, and reads as follows:—

"Sec. 9. The right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law. Hereafter a grand jury may consist of twelve men, any nine of whom con-

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"Sec. 9. The right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law. Hereafter a grand jury may consist of twelve men, any nine of whom con-

currence may find an indictment, but the legislature may change, regulate, or abolish the grand jury system."

"Sec. 13. Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by an indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

The act providing for prosecutions by information, and under which the petitioner was accused, provides, among other things, that all crimes, misdemeanors, and offenses may be prosecuted in the court having jurisdiction thereof, either by indictment, as "hereinafter provided," or by information. It further provides that "no grand jury shall hereafter be summoned or required to attend at the sittings of any district court in this state, unless the same shall be ordered by a district court, or by the judge thereof in the vacation or recess of said court; and the grand jury shall consist of twelve men, nine of whom must concur in the finding of an indictment." The act was undoubtedly intended to apply to prosecutions of all offenses committed prior to the passage of the act as well as to those committed thereafter. There is no repeal of existing laws, nor any saving clause providing that offenses committed prior to the passage of the act shall be inquired of, prosecuted, and punished under laws existing at the time of the passage of the act. It seems that the legislature had determined to dispense with grand juries after the act took effect, except when called by the court, or judge thereof, following very closely the law of Michigan in this respect. The general right to substitute prosecutions by information in place of prosecutions by indictment is conceded, in view of the constitutional provisions in this state, and it is not claimed that this infringes any right of a defendant. Indeed, this has been so frequently settled that it is unnecessary to cite any authorities, but we cite a few which have come immediately under our observation: *Hurtado v. People*, 110 U. S. 516; *In re Lowrie*, 8 Col. 499; 54 Am. Rep. 558; *State v. Barnett*, 8 Kan. 250; 87 Am. Dec. 471; *Rowan v. State*, 30 Wis. 129; 11 Am. Rep. 559. These cases dispose, also, of the question as to whether or not a proceeding by information is due process of law, and we do not consider it necessary to dwell longer on this point. We reach the vital question, which it is practically admitted is the only one before us, whether or not the petitioner has a right to complain now, after his plea of

guilty has been entered, that he was not indicted by a grand jury. Notwithstanding the somewhat singular case presented to us, of a defendant, represented in every stage of the case by eminent counsel, waiting until he has withdrawn his plea of not guilty, after he has interposed his plea of guilty, after he has had ample time to raise all objections to the validity of the proceedings, now asking this court to release him from imprisonment under what he claims is a void sentence, we shall proceed to determine the question whether or not the district court for Laramie County acquired jurisdiction of the case by the information filed therein, or whether the petitioner had a right to be indicted by the grand jury of said county.

The rules laid down for the determination of the question as to whether or not a law is *ex post facto* are found in the case of *Caldar v. Bull*, 3 Dall. 386, and have been very generally adopted by the courts of this country. They define the following laws as *ex post facto*: 1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; 2. Every law that aggravates a crime, or makes it greater than when it was committed; 3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. Mr. Justice Chase, who delivered the opinion of the court, says: "But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction." Tested by these plain rules, there would be little difficulty in determining the question before us; but the courts have not contented themselves with this clear definition; and so it was held by Mr. Justice Washington, in his charge to the jury in a United States circuit court, that "an *ex post facto* law is one which, in its operation, makes that criminal which was not so at the time when the action was performed; or which increases the punishment; or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage": *United States v. Hall*, 2 Wash. C. C. 866. In the case of *Kring v. Missouri*, 107 U. S. 221, this last definition was quoted with the evident approval of the learned jus-

tice delivering the opinion of the supreme court of the United States in that case, with a statement that the case was carried to the supreme court and the judgment affirmed, as reported in *United States v. Hall*, 6 Cranch, 171; but a careful investigation of the opinion in the case last cited will show that the charge of Mr. Justice Washington was not considered, or even touched upon, in the opinion of the court. It will be seen that the familiar definition of Blackstone, found in his commentaries (vol. 1, p. 46), has been much enlarged by modern decisions. Blackstone thus defines the meaning of an "*ex post facto* law": "When, after an action, indifferent in itself, is committed, the legislature then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it." Judge Cooley, in his work on constitutional limitations (5th ed. 329), says: "But, so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence, when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure, in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime. Statutes giving the government additional challenges, and others which authorized the amendment of indictments, have been sustained, and applied to past transactions, as doubtless would be any similar statute calculated merely to improve the remedy, and in its operation working no injustice to the defendant, and depriving him of no substantial right." This definition was accepted as most satisfactory in the case of *Robinson v. State*, 84 Ind. 452, where a statute providing that "in all questions affecting the credibility of a witness, his general moral character may be given in evidence," was held not to be an *ex post facto* law. The court say: "The statute is general, and applies to the trial of all criminal cases. It furnishes merely a rule of practice applicable alike to trials for offenses committed before and after its passage. It does not come within the constitutional

inhibition of an *ex post facto* law": *Vide Ex parte Bethurum*, 68 Mo. 545. The celebrated case of *Kring v. Missouri*, 107 U. S. 221, was a step further in the direction of enlarging the meaning and definition of an *ex post facto* law. Kring had pleaded guilty to murder in the second degree, and his conviction of this crime, under the law of Missouri in force at the time of the commission of the crime, was an acquittal of the crime of murder in the first degree. The constitution of Missouri had been changed after the commission of the crime in such manner as to abrogate this provision. The supreme court of the United States, by a bare majority of the justices, held this constitutional provision to be an *ex post facto* law, and that it could not apply to offenses committed prior to the taking effect thereof. Counsel for the petitioner urge with great force the following language of Mr. Justice Miller, who delivered the opinion of the court, as a new definition of an *ex post facto* law: "Can the law, with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by state legislation after the offense was committed, and such legislation not be held to be *ex post facto* because it relates to procedure, as it does according to Mr. Bishop? And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot." The learned justice who delivered this opinion did not seem to be satisfied with the definition, as he restates the definition in the *Case of Medley*, 134 U. S. 160, as follows: "The term '*ex post facto* law,' as found in the provision of the constitution of the United States, to wit, that 'no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts,' has been held to apply to criminal laws alone, and has been often the subject of construction in this court. Without making extracts from these decisions, it may be said that any law which was passed after the commission of the offense for which the party is being tried is an *ex post facto* law when it inflicts a greater punishment than the law annexed to the crime at the time it was committed: *Calder v. Bull*, 8 Dall. 386, 390; *Kring v. Missouri*, 107 U. S. 221; *Fletcher v. Peck*, 6 Cranch, 87; or which alters the situation of the accused to his disadvantage; and that no one can be criminally punished, in this country, except according to a law prescribed for his government by the sovereign

authority before the imputed offense was committed, or by some law passed afterwards, by which the punishment is not increased."

This is a material change in the definition given in the case of *Kring v. Missouri*, 107 U. S. 221, and it now remains to be seen whether or not the situation of the accused has been altered to his disadvantage. We do not see that it has. How does the change in the accusing tribunal take away any substantial rights of the accused? He admits himself, by his solemn plea of guilty, to be rightfully accused of a grade of the offense with which he is charged, and this presumably by the advice of his counsel, after due time has been given to him to plead, and after he has deliberately withdrawn his plea of not guilty. Should he now be heard to complain that a grand jury of sixteen men, as required by the law in force at the time of the commission of the offense, might not have indicted him? He admits his guilt, and after conviction and sentence says that he was not properly accused. This is a travesty upon justice, and illustrates the absurdity of the proposition laid down by some of the courts. It has, however, been recently held by the supreme court of Montana, in the case of *State v. Ah Jim*, 9 Mont. 167, that the constitutional provision there reducing the number of grand jurors from sixteen to seven, five of whom must concur in the finding of an indictment, is self-executing; and the court quotes with approval the following cases to show that such provisions apply to offenses committed before the passage of a law, and are not *ex post facto* in their nature or effect: *Cooley's Constitutional Limitations*, 272, 331, 332; *People v. Mortimer*, 46 Cal. 114; *Bishop on Statutory Crimes*, secs. 178, 180. In a California case (*People v. Campbell*, 59 Cal. 243; 43 Am. Rep. 257), it was held that "it is not an uncommon practice to change the number of grand jurors required to investigate criminal charges, but we have never heard the right of the legislature to make such changes questioned; neither has it ever been claimed that the charge must be investigated by the precise number of grand jurors of which that body was composed at the time the act was committed"; and the Missouri case was noticed in this opinion of the Montana court. So, then, it was held that the reduction in the number of the accusing body did not invade any substantial right of the defendant. If the broad definition of Mr. Justice Miller in the *Kring* case, apparently modified in the *Case of Medley*, 134 U. S. 160, was followed, it would seem

that such a change in the number of the grand jury might be the loss of a substantial right to the accused. If the defendant has an unalterable right to be accused by indictment, it would seem that he has a right to be presented by twelve men out of sixteen, if such law existed at the time of the commission of the offense; and that if a reduction in the number of the grand jury is not a change in his substantial rights to his disadvantage, the abolition of the accusing body itself would not be. He has been presented by a sworn officer, and, under our law, an official under bond, and the information must have been sworn to, as the law requires it.

It was held in the case of *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825, that although a law in force at the time of the commission of an offense (murder) provided that juries should be the judges of the law, and was repealed before the trial, it was competent to make the judge, instead of the jury, judge of the law of the case, as the legislature could make such a change, and that such a law was not *ex post facto*. The court adhered to its definition of an "*ex post facto* law" made in the case of *Marion v. State*, 16 Neb. 349, which is nearly in line with the definitions given heretofore, and says: "The procedure only has been changed. The degree of punishment, the character of the offense, and the rules of evidence remain as under the former law. It may be observed that the only change in the law is to provide another tribunal to pass upon the law of the case. Prior to the change, if the words in the former code are to be taken at their full meaning and import, the jury were the judges as to the law of the case on trial. After the change, the court sits in that capacity, and is the judge of the law. No vested right of the plaintiff in error is affected. A new tribunal may be erected, or a new jurisdiction given to try him, and no right is abridged": *Commonwealth v. Phillips*, 11 Pick. 28. Now, certainly, here was a change in the powers of the trial jury. They were stripped of the right to act as judges of the law, and the court was clothed with that power, and yet this was held to be no infraction of the rights of the defendant. In the case of *People v. Tisdale*, 57 Cal. 104, a case upon which the counsel for the petitioner greatly rely, and which they state to be the only case directly in point, found after the utmost diligence, the court said: "The real and only question is, whether an information presented after the repeal of a law, which required that a person who violated it should be proceeded against by

indictment, can be sustained for an offense committed before the repeal." That court held that the law was not intended to be retrospective, like ours. It also held that a constitutional guaranty such as existed at the time the respondents were charged with the violation of a statute could not be taken away by any act of the legislature. This seems to be the view taken by the supreme court of Washington, in the case of *McCarty v. State*, 1 Wash. 377; 22 Am. St. Rep. 152. In this case the offense occurred before the admission of the state into the Union, and the court there held that the guaranty of the constitution of the United States was in force at the time of the commission of the offense, and could not be taken away, and that the defendant was entitled to be presented by a grand jury. This was held evidently with much hesitation, as the court announces, on the petition for a rehearing, that in view of the public importance of the question, and in view of the fact that the case was submitted without oral argument on the part of the state, it would not be bound by the opinion rendered on the constitutional questions involved. The situation of the petitioner here is different. The constitution of Wyoming was in force five months before the offense was committed, and the only constitutional guaranty which was given to the defendant, except as to the passage of an *ex post facto* law, was, that, "until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by indictment, except," etc. It has been otherwise provided by law, and the defendant has not been deprived of any constitutional guaranty. The framers of our constitution did not mean to follow the language of the federal constitution, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of public danger." The intention appears plainly in our constitution that there should be no constitutional guaranty of a presentment or indictment of a grand jury, and that nothing should impede the right of the legislature to change, regulate, or abolish the grand jury system.

We cannot refrain from alluding to one provision of the law before us. It is provided in Kansas and in Michigan, by statute, that no information shall be filed until a preliminary examination has been had, unless such examination be waived, except in cases of fugitives from justice. This safe rule was

enlarged so that a prosecuting attorney may file an information when he is satisfied that a crime has been committed. This is a dangerous power to lodge in the hands of a prosecuting officer, for he may keep a prisoner, unable to give bail, in durance, without a preliminary examination, until the next term of court, which may be months ahead. The law makes provision for preliminary examinations, and the accused ought to have this hearing, or an opportunity for it, where he can introduce witnesses in his behalf,—a privilege not accorded to him before a grand jury,—one of the strong arguments for dispensing with that *ex parte* tribunal. We do not now intimate how we would decide this matter if properly before us, but we deem it proper to call attention to it, so that under the new practice there may be no excuse for following a dangerous method of procedure. We are forcibly impressed with one fact that crops out in the examination of this question. In the states of Michigan, Kansas, and Wisconsin, the ordinary method of accusation in criminal cases is by information, and has been for years. In Kansas and Michigan and probably in Wisconsin, no provision was made as to offenses committed prior to the passage of the law providing for prosecutions by means of information, and yet not a single case has been found where the question raised here has been presented to the court of last resort in any of these states, although such cases must have arisen. It is a strong presumption that such prosecutions as to past offenses were universally considered to be legal, although the constitutions of these states surely contain the familiar provision that “no *ex post facto* law shall ever be passed.” Even if such a clause does not appear there, it is in the federal constitution, and this is as much an inhibition upon the legislature of the states as if it had been incorporated in the state constitution: *Ex parte Bethurum*, 66 Mo. 545. We do not favor the practice of looking into the constitutionality of a statute in *habeas corpus* proceedings. In the states of Michigan, Missouri, Nebraska, Texas, and Iowa, in *habeas corpus*, the courts will not look beyond the judgment and re-examine the charges on which it was rendered, or pronounce the judgment an absolute nullity, on the ground that the constitutionality of the statute under which the conviction took place, or upon which the indictment was based, is controverted. That question, it is said, must be tested on appeal, writ of error, or trial in the appropriate court: *Church on Habeas Corpus*, sec. 370, and

the cases there cited. But the supreme court of the United States, in *Ex parte Siebold*, 100 U. S. 371, has established a different doctrine; and this seems now to be the rule in *habeas corpus*, as the learned author of the work above cited states: "But we apprehend the true rule to be, that when a prisoner alleges that the law under which he was convicted and sentenced is unconstitutional, or has been repealed before the trial and judgment, he may have these matters passed upon by the highest judicial tribunals, whether the attack upon the judgment be collateral, as by *habeas corpus*, or direct, as by appeal or writ of error": Church on Habeas Corpus, sec. 370. We do not see that the law of this state providing for prosecutions by information is *ex post facto* in its nature, nor that it has infringed any of the substantial rights of the petitioner, nor that he has lost any constitutional guaranty; and, entertaining these views, the demurrer to the answer and to the return of the sheriff must be overruled, and the petitioner remanded to the custody of the sheriff of Laramie County.

CONSTITUTIONAL LAW. — DUE PROCESS OF LAW, WHAT IS: See notes to *Bank of the State v. Cooper*, 24 Am. Dec. 537-545, and to *Bardwell v. Collins*, 20 Am. St. Rep. 554-559. The power of the legislature to alter the rules of evidence as they existed at common law, and to limit, change, and vary existing rules for the limitation of actions, is not affected nor destroyed by the constitutional provision prohibiting the taking of life without due process of law: *People v. Turner*, 117 N. Y. 227; 15 Am. St. Rep. 498. For a case in which a statutory provision declaring smoking or inhaling opium a misdemeanor was held not to be unconstitutional, see *Ali Lim v. Territory*, 1 Wash. 156.

EX POST FACTO LAWS are those which, in their operation, make that criminal or penal which was not so at the time the act was performed; or which increase the punishment; or, in short, which, in relation to the offense or its consequences, alter the situation of a party to his disadvantage: *Lindsey v. State*, 65 Miss. 542; 7 Am. St. Rep. 674. An act amendatory of an act, but which does not change the nature of the offense nor the amount of evidence necessary to prove the charge, nor the nature nor amount of punishment, but simply changes the mode of trial, is not an *ex post facto* law: *City Council v. O'Donnell*, 29 S. C. 355; 13 Am. St. Rep. 728. When, at the time of the commission of an offense for which the prisoner is on trial, the statute provided that juries should be judges of the law in such cases, and before the trial this statute was repealed, the defendant is entitled to the benefit of the repealed statute: *Marion v. State*, 20 Neb. 233; 57 Am. Rep. 825.

PROSECUTIONS BY INFORMATION, LAWS AUTHORIZING, WHEN EX POST FACTO: See note to *Bardwell v. Collins*, 20 Am. St. Rep. 558. In *State v. Kingsley*, 10 Mont. 537, it was held that a conviction in a court of the state, for a felony committed in the territory prior to the adoption of the constitution, cannot be sustained where the prosecution was by information. On the other hand, *Lybarger v. State*, 2 Wash. 552, holds that a law changing

the mode of procedure from an indictment to an information in prosecutions for crime does not contain any of the elements nor respond to any of the accepted definitions of an *ex post facto* law, although the offense under prosecution may have been committed prior to such change in the law. The results of a few recent cases in which *ex post facto* laws were discussed may be summarized as follows: An ordinance declaring that all sales of intoxicating liquors thereafter made by persons failing to comply with its provisions is not an *ex post facto* law: *Moore v. Indianapolis*, 120 Ind. 483; nor is an act substituting the state penitentiary for the county jail as the place of confinement pending execution, and directing that executions which had before taken place publicly should thereafter take place within the penitentiary walls, *ex post facto* as to one under sentence when the act took effect, as it does not change the punishment to his disadvantage: *In re Tyson*, 13 Col. 422; nor is a statute authorizing the leasing of convict labor and the working of the convicts in mines an *ex post facto* law: *Mason etc. Co. v. Main Jellico etc. Co.*, 87 Ky. 467. But where an act passed in 1886 provided a penalty for intoxication, and a later act passed in 1888 provided a different penalty, and repealed the former act without any saving clause as to offenses already committed, it was held that there could be no conviction for an offense committed before the later act took effect: *State v. Meader*, 62 Vt. 458.

HABEAS CORPUS, WHAT MAY BE INQUIRED INTO ON.—That the constitutionality of the act under which conviction has been had may be inquired into, see cases cited in note to *Morrill v. Morrill*, 23 Am. St. Rep. 110.

GRAHAM v. CULVER.

[8 WYOMING, 639.]

JUDGMENT — ESTOPPEL. — A judgment for the plaintiff sweeps away every defense that should have been raised against the action, and this for the purpose of every subsequent suit, whether founded upon the same or a different cause. Thus in a possessory action, the defendant is under obligation to plead all the titles under which he claims, and if he fails to do so, and judgment is entered against him, he cannot, in a subsequent action, set up title of which he might have availed himself in the first.

JUDGMENT — HOMESTEAD. — When a person not under disability is sued, and the homestead is involved, it will be affected by any neglect to assert it, precisely the same as any other right.

JUDGMENT — HOMESTEAD RIGHTS, WHEN CONCLUSIVE AGAINST. — If a suit in chancery is brought against a husband and wife, in which plaintiffs allege themselves to be the owners of certain real property, and that they are unlawfully kept out of possession by defendants, and that certain deeds under which the wife claims title were made to hinder, delay, and defraud creditors of the husband, and plaintiffs pray that they may have possession of the property and be declared owners thereof, and that the deeds to the wife be adjudged fraudulent and void, and set aside, and judgment is rendered in favor of the plaintiffs for the relief sought, such judgment is conclusive against every claim of right to possession existing in favor of defendants, and precludes the wife from sub-

sequently asserting any title or right of possession on the ground that the property was, before the commencement of the former action, and still is, a homestead, and that the title of the plaintiffs is based upon a sale of the property under execution against her husband when it was exempt from such sale.

Walter R. Stoll and R. W. Breckons, for the plaintiffs in error.

Charles N. Potter, for the defendants in error.

CONAWAY, J. This case stands on demurrer to the amended petition. The demurrer sets up two grounds: 1. That the amended petition does not state facts sufficient to constitute a cause of action; and 2. That the amended petition shows on its face that the matters put in controversy by it have already been adjudicated. It seems that the amended petition does state facts sufficient to constitute a cause of action, and, for reasons which will be apparent, it is assumed that it does, unless for the reason that it shows a former adjudication of those facts. And this resolves the two grounds of demurrer into one, which is substantially the way in which the cause has been stated and argued by counsel. And the question is, Does the amended petition show on its face that the matters in controversy have been adjudicated in a former action? If this question should be resolved in the affirmative, the judgment of the trial court must be affirmed; otherwise, reversed.

The amended petition sets up that there was a former action between James M. Culver and Mowry A. Arnold, the parties in interest as defendants here, as plaintiffs, and Jeremiah and Hannah Graham, plaintiffs here, as defendants. The former action was by bill in chancery. The amended petition in this action exemplifies that bill by copy as exhibit A, and exemplifies the answer thereto by copy as exhibit B. The amended petition, including these exhibits, shows substantially the following state of facts, which, in deciding this demurrer, are to be taken as true: The said Jeremiah Graham and Hannah Graham were husband and wife, and had occupied the premises in controversy as a homestead since 1874, but on October 24, 1883, they had, by their joint deed executed in legal form, conveyed the premises to one A. S. Emery, who, at about the same time, conveyed them to the said Hannah Graham, both deeds being acknowledged the same day, October 26, 1883, and one being recorded that day, and the other on October 31, 1883. On the tenth day of January,

1884, the said Culver and Arnold commenced an action against Jeremiah Graham on a money demand, and sued out an attachment against him in said action, and had it levied on the realty in controversy as the property of Jeremiah Graham, notwithstanding these conveyances vesting the legal title in Hannah Graham. They obtained judgment in their action against Jeremiah Graham for \$725 and costs, with an order for the sale of the attached property, and a special execution issued for the sale thereof, under which it was sold by the sheriff, they becoming the purchasers for \$910. Afterwards, in due course of legal proceedings, the sale was confirmed by the court, and Culver and Arnold received a sheriff's deed for the property. This execution sale and resulting proceedings were had without any affidavit that the property was worth over fifteen hundred dollars, which is required to authorize the sale of a homestead property on execution. Hannah Graham appeared at the execution sale, and, before the sale was effected, forbade it, saying to the people there assembled that the property was her individual, separate, and exclusive property, and not Jeremiah's. The confirmation of the sale afterwards is claimed to have been procured without notice to Jeremiah Graham; and when Culver and Arnold received their sheriff's deed for the property, Jeremiah and Hannah Graham, still being in possession, refused to surrender possession. Thereupon Culver and Arnold brought their bill in chancery, alleging that they were the owners of the property and entitled to immediate possession thereof, and that they were unlawfully kept out of possession by Jeremiah and Hannah Graham, and that Hannah Graham's title deeds were made to delay, hinder, and defraud the creditors of Jeremiah Graham, and setting up the facts at length upon which their title was founded, and praying for possession, and to be declared the owners of the property, and that Hannah Graham's title deeds be declared fraudulent and void, and set aside. The answer denied the title and ownership of Culver and Arnold; denied that they were entitled to the possession of the property; denied that Hannah Graham's title deeds were fraudulent; and resisted the granting of the relief prayed for by the bill. The supreme court of the territory, reversing the trial court, granted Culver and Arnold substantially the relief they asked for, and remanded the case; whereupon the district court, by final decretal order, proceeded to carry out the decree of the supreme court, and granted a writ of posses-

sion in favor of Culver and Arnold, and against the plaintiffs in error, to enforce and execute the order. Neither bill nor answer said anything about any homestead right in the premises. Plaintiffs in error brought the present action in the court below, seeking to have the sheriff's deed to Culver and Arnold declared null and void, and delivered up to them, and canceled of record, and that the judgment and decree in the former action be declared null and void, and that the sheriff be perpetually restrained from executing the writ of possession issued therein; and they ask for a temporary restraining order and costs.

Does this state of facts show an adjudication of the issues presented in the present action? It is claimed by the plaintiffs in error that it does not show an adjudication of their homestead right. Was the homestead right included in the issues adjudicated in the former action? That action has more than one object, and the bill of complaint tendered more than one issue. One object, probably the leading one, as being the immediate cause of the commencement of the action, was to obtain possession of the property, — to put plaintiffs in error out, and to put defendants in error in. To accomplish this alone, the appropriate remedy would have been the legal action of ejectment. Another object, no less important, was to settle the title and ownership in defendants in error as against plaintiffs in error, by a decree declaring the title deeds of Hannah Graham fraudulent and void, and declaring defendants in error the owners of the property, as well as entitled to the immediate possession. The setting aside and declaring void the title deeds of Hannah Graham was a matter of purely equitable jurisdiction. The twofold nature of the relief sought, it being partly legal and partly equitable, has evidently led to some confusion of ideas, according as the cause has been viewed from a legal or an equitable standpoint. The supreme court of the territory, in the able and exhaustive opinion delivered on the occasion of reversing the judgment of the district court in the action, uses the following language: "When the property was offered by the sheriff at public vendue, Hannah Graham, wife of Jeremiah, appeared, and forbade the sale, claiming for herself the sole and exclusive ownership of the property. Being jointly with her husband in possession, she refused to surrender to the purchasers, who, it appears, did not apply on the confirmation of their deed, as they might have done, for the writ of *habere facias*,

or other appropriate execution, to put them into possession of the property, which the court, by its officer, had sold to them, but sought their remedy by a bill in chancery assailing the alleged title and ownership of the wife, and praying that she and her husband be adjudged to surrender possession to them. The appellants claiming the legal estate and the right of entry, it would seem that, for them, the action of ejectment was the more appropriate remedy; but since the appellees appeared in the court below, and, without objection to the form of procedure, filed their answer controverting the material allegations of the bill, inquiry upon this feature becomes unimportant": *Culver v. Graham*, 3 Wyo. 211. With all due deference to the known learning and ability of the court which pronounced this criticism, it may be permissible to suggest that the criticism itself is not a well-considered one, and that had an objection to the form of procedure been interposed in due time, before answer, it would still have been unimportant. The reference to the confirmation of the deed is a mere slip of the pen; it was the sale that was confirmed, before the deed was made or could lawfully have been made. A more important matter is as to the method and form of procedure. If defendants in error sought relief by bill in chancery, when they had a plain and adequate remedy at law, that fact should not be lost sight of in considering their equities now. But how could a writ of *habere facias*, or any writ of that nature, be available under the state of facts as they existed at the time? How could such a writ, issued on a judgment against Jeremiah Graham alone, be effective against Hannah Graham, or any one except Jeremiah Graham? Why should a writ of *habere facias* run at all? The attachment was not a foreign attachment. The judgment was not a judgment *in rem*, so as to bind all the world. It was a personal judgment against Jeremiah for so much money, with a judgment order for the sale of the property attached as his, thus keeping alive the attachment lien. The court, by its officer, had not sold any property to defendants in error, in the sense of warranting any title to the property. It had simply approved the execution sale, and ordered a sheriff's deed, which, in the language of the statute in force at the time, was "sufficient evidence of the legality of such sale and the proceedings therein until the contrary be proved," and would "vest in the purchaser as good and as perfect an estate in the premises therein mentioned as was vested in the party at or after the time when

such lands and tenements became liable to the satisfaction of the judgment." Hannah Graham, as well as Culver and Arnold, claimed ownership and right of possession by virtue of a legal title, and one which she claimed to be paramount to theirs, with the advantage, on her side, that she was in possession, and they were not. There had been no suit, attachment, or judgment against her. There had been no attachment or execution levied upon property as hers. There had been no execution sale or sheriff's deed of her right, title, and interest in any realty, vesting in the purchaser as good and as perfect an estate as had been vested in her. No writ in the nature of *habere facias* could run against her. No right or claim of hers had been adjudicated, and there could have been no propriety, and no warrant in law or in equity, for attempting proceedings to oust her possession under process against another person. Such proceedings, to have had any effect at all as to her possession, must have been arbitrary and wanton, as well as forcible and illegal; and if she had been deforced of her possession by such means, it could not have settled any question affecting her rights or equities, and could not have prevented another suit: See *Miz v. King*, 55 Ill. 435; 66 Ill. 145. We should not approach the consideration of Hannah Graham's rights with the idea that she could have been legally and effectively deprived of her possession by such means. As to the proper form of action for Culver and Arnold to adopt, it is true that an action of ejectment at law would have been available to try the right of possession, but it would not have been available to vacate and set aside the title deeds of Hannah Graham. The relief sought and the issues tendered were partly legal and partly equitable. Equity, obtaining jurisdiction for one purpose, properly proceeded to administer relief as to the entire matter within the issues. That it would do so was evidently the view of the learned solicitors for the complainants in that suit when they sought their remedy by bill in chancery. Such was evidently the view of the learned solicitors for the defendants when they answered without making objection to the form of procedure.

There were issues of equitable cognizance, as well as legal, to be determined; and this brings us to the question, What were the issues adjudicated in that suit? Having endeavored to brush away some of the fog which had settled around this case and obscured its surroundings, we will now endeavor to trace our way through the fields of *res judicata*. In the

pleadings in contested suits there are often numerous allegations more or less intimately connected with the subject-matter of the litigation, and bearing upon the issues involved, which are, in no proper sense, issues in themselves, although they may be alleged on one side, and denied on the other. They are evidentiary matters, or matters of persuasive or argumentative force, as bearing upon the actual issues in the cause, but are not issues in themselves, in the sense of seeking, requiring, or receiving adjudication. Such allegations may be true, and still the party making them not be entitled to the relief sought; they may be false, and yet the party entitled to the relief on other grounds. Such allegations are not necessarily included in the issues, in the finding of facts, or in the judgment. Unless specially pleaded, they are not adjudicated. Courts have sometimes endeavored to lay down rules, and have made suggestions not altogether harmonious, as to the methods of determining, among these multitudinous allegations, those which constitute the real issues in the cause. Wells, in his work on *res adjudicata*, gives probably as good a discussion of this matter as any to be found under the rigid rules of the common law. The same principles, with a more liberal construction, apply in chancery. We quote from Wells:—

“Sec. 200. Our first inquiry herein is, What is to be regarded as a matter in issue? It is plain that there may be subordinate and incidental matters tried during the controversy; but they are not to be considered as the matter in issue, in the sense of the rule. The New Hampshire court affords us a clear though not an exhaustive definition, thus: ‘Any fact attempted to be established by evidence, and controverted by the adverse party by evidence, may be said to be in issue in one sense; as, for instance, in an action of trespass, if the defendant alleges and attempts to prove that he was in another place than that where the plaintiff’s evidence would show him to have been at a certain time, it may be said that this controverted fact is a matter in issue between the parties. This may be tried, and may be the only matter put in controversy by the evidence of the parties. But this is not the matter in issue within the meaning of the rule. It is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, which is in issue. The declaration and pleadings may show specifically what this is, or they may not. If they do not, the party may

adduce other evidence to show what was in issue, and thereby make the pleadings as if they were special. But facts offered in evidence to establish the matter in issue are not themselves in issue, within the meaning of the rule, though they may be controverted on the trial. Deeds which are merely offered in evidence are not in issue, even if their authenticity be denied. When a deed is merely offered in evidence to show a title, whether in a real or personal action, there is no *non est factum* involved in the matter put in issue by the plea of *nil disseisin*, or not guilty, which makes the execution of that deed a matter in issue in the case, notwithstanding the jury may be required to pass on the fact of its execution. The verdict and judgment do not establish the fact one way or the other, so that the finding is evidence. The title is in issue. The deed comes in controversy directly, in one sense,—that is, in the course taken by the evidence, it is direct and essential,—but in another sense it is incidental and collateral. It is not a matter necessary of itself to the finding of the issue. It may be made so by the parties.’”

This language has been criticised, as confining the matter in issue and the matter of *res judicata* in limits too narrow. However that may be, it makes clear the distinction between matters which are merely evidentiary and matters which constitute the issue. And it is clear that an action of ejectment might have been brought at law, and prosecuted to judgment, for the possession of the realty involved, without making an issue of the validity of Hannah Graham's title deeds; and the right of present possession might have been adjudicated without putting the title in issue. In order to adjudicate and settle in one action all questions in regard to the title and right of possession of the realty in controversy, it was necessary to bring the suit in chancery, and to charge specially the invalidity of Hannah Graham's title deeds. Evidently with this view Culver and Arnold brought their bill in chancery, praying a decree giving them possession of the property, and declaring them the owners, and declaring Hannah Graham's title deeds void. But it is argued that only the last of these three proposed issues was actually made an issue by the pleadings and adjudicated. This requires a more critical examination of the pleadings. The bill, after showing a regular course of proceedings in the attachment suit leading up thereto, alleges, in paragraph 7, the execution and delivery of the sheriff's deed to Culver and Arnold for the consideration of

\$910, paid by them at the time of the sale. Paragraph 7 of the answer denies every allegation of paragraph 7 of the bill. Here is an issue of title formed as fairly as ever issue was formed by a declaration of title by deed, and a plea of *non est factum*. As to Hannah Graham's title deeds, paragraph 9 of the bill charges them to have been fraudulent, and to have passed no title. Paragraph 9 of the answer denies every allegation of this paragraph of the bill. Another distinct issue: Allegations connected with the showing of title, but showing also a right of present possession, are found in several paragraphs of the bill, which are denied by the answer, forming clearly an issue upon such right of possession affirmed on one side and denied on the other, though not so tersely and succinctly as the other issues. Besides, the judgment expressly adjudicates the right of possession; and the judgment is evidence, and conclusive evidence, of what was adjudicated. These three issues evidently cover all the matters in controversy in that suit or in this. It is true, an injunction is asked for in this suit; but if the matters included in these three issues be eliminated, there will be no bone of contention left. The ground upon which the injunction is asked is involved in the determination of these issues. The judgment of the district court in favor of Hannah Graham was an adjudication of all three issues against her. Is that adjudication conclusive? and does it include and bar the homestead right?

One of the main rules of estoppel by judgment reads thus: "A judgment rendered by a court of competent jurisdiction on the merits is a bar to any future suit between the same parties, or their privies, upon the same cause of action, so long as it remains unreversed; or, as otherwise phrased, the doctrine of *res adjudicata* is plain and intelligible, and amounts simply to this: that a cause of action, once finally determined, without appeal, between the parties on the merits, by a competent tribunal, cannot afterwards be litigated by new proceedings, either before the same or any other tribunal": 2 Black on Judgments, sec. 504. "It is important to be observed, in this connection, that a judgment, when offered as evidence in a subsequent litigation, is either conclusive evidence, suffering no contradiction, or it is of no effect at all; and it is not admissible as evidence of the matter on which it is offered, except where it is conclusive; that is to say, it can never be admissible as tending to prove a given fact, for if it is offered as evidence against a stranger to the former litiga-

tion, it is not admissible at all, and if against a party or privy, it is conclusive": Sec. 505. "It is a general rule that a valid judgment for the plaintiff definitely and finally negatives every defense that might and should have been raised against the action; and this is true, not only with respect to further or supplementary proceedings in the same cause, but for the purpose of every subsequent suit between the same parties, whether founded upon the same or a different cause of action. A party cannot relitigate matters which he might have interposed, but failed to do, in a prior action between the same parties, or their privies, in reference to the same subject-matter; and if one of the parties failed to introduce matter for the consideration of the court that he might have done, he will be presumed to have waived his right to do so. If a party fails to plead a fact he might have pleaded, or fails to prove a fact he might have proven, the law can afford him no relief. When a party passes by his opportunity, the law will not aid him": Sec. 754. The doctrine is well stated by Wells in his treatise on *res adjudicata*:—

"Sec. 253. The principle is the same, whether the matter which might have been adjudicated in the first suit would have been therein ground of action, or a defense against plaintiff's claim. Thus the Illinois court, quoting Bigelow on Estoppel with approval, say: 'It follows, also, from the authorities considered, that a valid judgment for the plaintiff sweeps away every defense that should have been raised against the action, and this, too, for the purpose of every subsequent suit, whether founded upon the same or a different cause; nor will equity relieve the defendant from a judgment on any ground of which he should have availed himself in the action at law.'

"Sec. 254. Thus in a possessory action, a defendant is under obligation to plead all the titles under which he claims; and if he fails to do so, and judgment is rendered for the plaintiff, the defendant cannot be allowed, in a subsequent suit, to set up a title which he omitted to plead, in order to gain possession. Where an issue is made between the parties to a suit, each is presumed to advance all the evidence in his power to enable the issue to be determined correctly. If one of the parties neglects or does not wish to introduce a part of his evidence when it is known to him, the issue cannot, after a final decision, be opened to enable him to do so. If this were possible, litigation would be uselessly continued. If a

party has four titles, he could institute in succession four different suits, instead of having the issue of ownership determined in one suit. This does not conflict with the rule requiring a distinction between matter of the substance of the issue and mere matters of evidence. It means only that a substantial defense must be set up at the first opportunity, and not afterwards."

References to numerous cases sustaining these views will be found at the sections quoted. We will not occupy space to quote them. They are abundant and uniform.

But it is urged that the homestead right is favored by the courts, and constitutes an exception to the principles of *res judicata*. Now, this is matter for very serious consideration. If a judgment of a court of competent jurisdiction expressly, upon the question of title or the right of possession of realty, does not settle that identical question, even as between the parties to the action and their privies, then would it seem that there are no means adequate to the purpose, and that interests in realty can never be secure; and, not being able to rely upon the judgment of our courts in such matters, we can never know when our interests in realty are safe and reliable. The doctrine of favoring homesteads seems to have been carried to its greatest extent in Illinois; so it will be necessary to examine the decisions of the courts of that state to ascertain whether, in its utmost limit, it is really to the effect that a judgment expressly upon the question of title or the right of possession of real estate is not conclusive as between the parties and their privies, and whether a slumbering homestead right may be resurrected to defeat the judgment. We will not quote the cases at length, which would make this opinion additionally tedious, but will try to state their substance correctly. Over forty years ago, away back in February, 1851, it seems the legislature of Illinois yielded to their patriotic impulses, and passed a homestead law, to take effect on the fourth day of July following. It exempted to the debtor, being a householder and head of a family, a homestead to the value of one thousand dollars. About six years afterwards, in 1857, the legislature amended this, to the effect that the husband alone could not convey or encumber the homestead, but required that the wife should join, and prescribed how the husband and wife together might encumber or convey the homestead. Under this legislation, mortgages were made of homesteads, and suits were brought foreclosing such mort-

gages, making both husbands and wives defendants; and the court held that a decree of foreclosure in these cases, in the usual form, was not conclusive of the homestead right. The former judgment in the case at bar is not in a case of foreclosure of a mortgage; and the Illinois cases are analogous to this case only as instances of avoiding, *pro tanto*, in favor of the homestead right, the effect of the general language of the decree of foreclosure cutting off the right, title, and interest of defendants in such cases. The reason upon which the court founded this acknowledged innovation in the law of the absolute conclusiveness of judgments, according to their terms, was the legal disability of the wife to defend for her own right. The doctrine is stated as follows, in a leading case under this law, decided in 1863: "This mortgage, as to the homestead right, is like a mortgage in which the wife has not released her right of dower, when sought to be enforced in defiance of that right. Suppose, in such a case, the wife were made a party to a bill to foreclose a mortgage, without any averment that any right of dower existed, or that the wife had released her dower, and a decree passed against the husband and wife, foreclosing the mortgage, and ordering a sale of the premises. No one would contend that the right of dower would be affected by such decree, or that a sale under it could convey the premises freed from the right of dower, and for the simple reason that the law has provided a different and an only mode for the release of dower. So here, the statute has provided another, different, and only mode for the release of the homestead right, while the premises are occupied as a homestead. The husband cannot, by failing to make defense for himself and wife, give the mortgage, in which the wife has not released the homestead, the same practical effect that it would have, had she thus released. This would be to defeat the statute, and its manifest object, by a mere legal form": *Hoskins v. Litchfield*, 31 Ill. 137; 83 Am. Dec. 215. The disability of the wife is set up as the basis of the decision, but the illustration of the dower right is not a happy one. Still, we would be loath to criticise this *dictum* of the supreme court of the great state of Illinois as to the "simple reason" why a decree of foreclosure would not bar the wife's right of dower in the case supposed, but we feel at liberty to quote the language of the court of last resort of the state of New York, giving its view as to the simple reason for the same result. That court says: "And when the authorities say that a judg-

ment is final and conclusive upon the parties to it as to all matters which might have been litigated and decided in the action, the expression must be limited as applicable to such matters only as might have been used as a defense in that action against an adverse claim therein, — such matters as, if now considered, would involve an inquiry into the merits of the former judgment. The existence of an inchoate right of dower in the plaintiff would not have been a defense to the action of the receiver for a sale of the premises, and a satisfaction from the avails of the sale of the judgment debt which he represented. It could not, if pleaded and shown, have prevented a judgment substantially that which was rendered²²: *Malloney v. Horan*, 49 N. Y. 116; 10 Am. Rep. 835. See also *Whitcomb v. Williams*, 4 Pick. 228; and *King v. Chase*, 15 N. H. 18; 41 Am. Dec. 675.

An inchoate right of dower may never become a perfect right. So long as the husband lives, and he may in any case outlive the wife, it is not available as a defense or as a cause of action. Not so the homestead right. It is a present and continuing right of possession on the homestead property, so long as it is occupied as such, under some statutes, or, under other statutes, such as those of New York and Wyoming, an absolute right to a homestead property of a certain value, or its proceeds to an equal amount, forever; and it is available as a defense to an action for the possession of the property. The real foundation for the doctrine which the Illinois court adopted was the legal disability of coverture. The cases nearly all place it on this ground. And when this disability disappears, the doctrine disappears. The cases decided upon the principle under consideration, as far as they have been called to our attention, or fallen under the observation of the court, were decided in 1863 and 1864: *Moore v. Titman*, 33 Ill. 858; *Moore v. Dixon*, 35 Ill. 208; *Wing v. Dropper*, 35 Ill. 256. The doctrine then disappears. The latest case in which we find it mentioned is *Wright v. Dunsing*, 48 Ill. 271, 52 Am. Dec. 257, decided in 1867; and it was there stated merely to say that it was not applicable in that case. In a very lucid and able opinion it is stated with its limitations. Having stated the general rule of the conclusiveness of judgments according to their terms, the court proceeds: "It may, however, be said that the right to hold the homestead forms an exception to the rule. It has been so held to the extent that where the husband and wife are made parties, and they are entitled

to homestead rights, and they are not relied upon, the wife is not concluded or barred from asserting the right; and inasmuch as she cannot sue alone for the right, that it may be asserted by the husband and wife, notwithstanding the decree or judgment. And this exception grows out of the statute conferring the right, which declares that the husband alone cannot release the right, but that he must be joined by the wife. If a husband and wife were to make a mortgage, and the wife were to relinquish her dower, but refuse to release her right of homestead, and when suit should be brought for a foreclosure, if that right should be cut off by the wife's failing to set it up, the husband, by refusing to insist upon it, or to enable the wife to do so, could in this mode release the homestead without the assent of the wife, and thus defeat the statute. This court, however, has not held, nor has it intended to hold, that an unmarried head of the family, capable of releasing the homestead, and occupying it, failing to assert the right, where a court is called on to pass upon the right, that he would not be concluded. This is the extent to which the exception has been carried. And when a person not under disability is sued, and the homestead is involved, it will be affected by any neglect to assert it, precisely as any other right. Appellee was not under disability, and should have set up and insisted upon the right when before the court in the partition suit; and failing to do so then, she should now be concluded from claiming the benefit." This was a suit by a widow to enforce her homestead right in property belonging to the estate of her deceased husband. She was entitled, on his death, to both dower and homestead, but in a suit for partition to which she was a party, had only claimed dower. Held, that she could not afterwards claim her homestead. Observe the language: "And when a person not under disability is sued, and the homestead is involved, it will be affected by any neglect to assert it, precisely as any other right." Now, consider this in connection with the following statutory provisions:—

"Sec. 26. If a husband and wife be sued together, the wife may defend her own right; and if the husband neglect to defend, she may defend for his right also": Wyo. Comp. Laws 1876, p. 87.

This section was in force in Wyoming when the former action was brought, by which the title and right of possession in the property in question was adjudicated as between all the

parties in interest in the present action. The section continued in force until replaced by provisions still more sweeping in removing disabilities of married women to prosecute and defend actions. The ground upon which the Illinois courts proceeded did not exist in Wyoming. All those decisions by the Illinois courts of the character referred to are of date prior to the legislation of the state removing the disability of the wife to sue and defend alone. Such decisions are not in point under statutes such as ours, or such as the Illinois statute of 1874. The effect of such legislation is stated in an Illinois case decided in 1886. The court says: "We cannot think but that the effect of this legislation is to destroy the unity of the husband and wife in one person, as existing at the common law, respecting the person and property rights of the wife. She now loses none of the rights pertaining to natural persons — that of personal liberty, personal security, and private property — by marriage, to any greater extent than does the man. Regarding these absolute rights, they are placed on an equality; the same remedies are open to each to enforce those rights or to redress any injury arising from their violation. The reason of the rule, existing at the common law, which deprives her of the right to sue in her own name has ceased, and the rule itself ought to go with it": *Bassett v. Bassett*, 20 Ill. App. 543. And the court might well have added that the legislation of that state, as of Wyoming, has provided a new rule, which makes effective all the rights which the recent legislation has given her, — the rule that she may sue and defend alone. It is further to be remarked that the Illinois cases establishing the exception to the application of the principle of *res judicata* in favor of the homestead right of a married woman under the common-law disability of coverture were all cases of foreclosure of mortgages. The judgment or decree in such cases does not profess to pass upon the title or even the right of possession in the property involved. It simply forecloses and cuts off the right, title, and interest of defendants, without ascertaining or adjudicating, or attempting to ascertain or adjudicate, what the extent of that right, title, or interest may be. And that is all that is sold. Purchasers know that they have to look elsewhere to ascertain what right or title they are buying. They do not look to the decree of foreclosure as settling any question of title, or even any possessory right. But in cases like the one at bar, in which the title and right of possession is put in issue, and litigated and adjudicated,

cated, they do look to the judgment or decree as the very highest possible evidence upon the question adjudicated, whether it be of the title or possession, or both. The homestead right, if set up in the former action and proven, would have been a complete defense to the action for the possession of the property. It would have prevented the judgment or decree of the supreme court in favor of Culver and Arnold, and against Jeremiah and Hannah Graham, for such possession. It cannot be set up now without involving an inquiry into the correctness of that judgment; therefore it became *res judicata*, under the strictest limitation of the rule as stated by Wells, by the New Hampshire court, and also in *Malloney v. Horan*, 49 N. Y. 116; 10 Am. Rep. 385. See also *Fischli v. Fischli*, 1 Blackf. 360; 12 Am. Dec. 251; *Ulrich v. Drieschell*, 88 Ind. 358; *Snapp v. Snapp*, 87 Ky. 554; *Lee v. Kingsbury*, 18 Tex. 68; *Cayce v. Powell*, 20 Tex. 767; 73 Am. Dec. 211; *Tadlock v. Eccles*, 20 Tex. 782; 73 Am. Dec. 218; *Chilson v. Reeves*, 29 Tex. 281; *Nichols v. Dibrell*, 61 Tex. 540; and *Miller v. Sherry*, 2 Wall. 237.

It has been suggested, rather than argued, that the homestead right could not have been pleaded in the former action, because it was inconsistent with the plea of title in Hannah Graham. How inconsistent is not apparent. Our statute recognizes the homestead right in the property of the wife as well as in that of the husband. It has been urged in argument that it was incumbent on the complainants in the former action to set up the homestead rights of the defendants therein, and that their failing to do so was concealing it from the court, and misleading the court. This is a strange rule of pleading. Complainants cannot know, and have no right to dictate, what defendants shall rely on in defending actions. Both the title and the right of present possession in the property in question was litigated in the former action. The final result of that litigation was an adjudication adverse to plaintiffs in error. It is now sought to relitigate the same matter on the ground that the plaintiffs in error had a good defense to the former action which they did not present, and that the decree was consequently wrong, — not wrong as being an erroneous decision of the case as presented, but wrong as not being what it ought to have been if such defense had been presented. This is the condition of the matter now, however ingeniously it may be disguised. We cannot know what the judgment and decree would have been if such defense had

been presented; but we do know that if any good defense had been presented, and established by abundant proof, or confessed by the opposite party, and the court had erroneously ignored it, and had erroneously decided the case on other grounds, and had rendered a final judgment and decree clearly erroneous, the error could not be corrected in this proceeding. When the supreme court of the territory, the court of last resort, acted upon the matter, however erroneously, no other court could question the correctness of its decision. In short, the jurisdiction of the court in the former action is admitted, and is clear from the pleadings, and its decree cannot be collaterally attacked. It is sought in this action to have that decree declared null and void. It has not been shown to be null and void, but the contrary. It has not even been shown that it is erroneous on the case presented in that action, but erroneous because defendants had a good defense which they withheld. In the language of Wells, *supra*: "If one of the parties neglect or does not wish to introduce a part of his evidence, when it is known to him, the issue cannot, after a final decision, be opened to enable him to do so." And this would seem to be the rule in proceedings directly attacking a judgment, and, *a fortiori*, in cases of collateral attack. All matters of difference between the parties in interest in this action are shown by the petition to have been adjudicated in a former action. The demurrer to the petition was therefore properly sustained. The judgment is affirmed.

JUDGMENT, ESTOPPEL BY. — The principle of *res judicata* extends not only to questions of fact and of law which were decided in the former suit, but also to grounds of recovery or defense which might have been, but were not, presented: *Harmon v. Auditor*, 123 Ill. 122; 5 Am. St. Rep. 502; *Hobby v. Bunch*, 83 Ga. 1; 20 Am. St. Rep. 301; *Diehl v. Marchant*, 87 Va. 447. An adjudication is not conclusive as to matters not in issue, unless they are incident to or essentially connected with the subject-matter of such adjudication: *Donahue v. McCook*, 81 Iowa, 296; but whatever is necessarily implied in the former decision is, for the purposes of estoppel, deemed to have been actually decided: *Huntley v. Holt*, 59 Conn. 102; 21 Am. St. Rep. 71. And a decree, on final hearing, dismissing a bill to remove a cloud on title, though the dismissal results merely from defect of proof, is *res judicata*, and bars a subsequent suit by complainant against the same parties, involving the title to the same land: *Chiles v. Champenois*, 69 Miss. 603.

JUDGMENT — HOMESTEAD RIGHTS, HOW FAR AFFECTED BY. — A JUDGMENT of foreclosure against husband and wife conclusively settles that the property directed to be sold was not within the homestead exemption at the time of rendition, unless fraud is alleged: *Lee v. Kingsbury*, 13 Tex. 68; 62 Am. Dec. 546. But a decree of foreclosure concludes the rights neither

of husband nor wife, when the husband appears alone in the suit: *Revalle v. Kraemer*, 8 Cal. 66; 68 Am. Dec. 304; *Burnap v. Cook*, 16 Iowa, 149; 85 Am. Dec. 507; *Larson v. Reynolds*, 13 Iowa, 579; 81 Am. Dec. 444. And where husband and wife join in a mortgage of homestead property, but the wife does not release her homestead right, such right is not affected by foreclosure and sale of which the parties had notice, and to which they did not object, and such sale will be set aside on motion: *Hoskins v. Litchfield*, 21 Ill. 13; 83 Am. Dec. 215.

METCALF v. HART.

[3 WYOMING, 512.]

PARTIES—DEFECTS IN.—If one of several heirs has brought an action to recover possession of real property, a suit in equity may be maintained against him without joining his co-heirs as defendants to enjoin his further prosecution of the action at law, and for other equitable relief.

PRACTICE IN CHANCERY.—THE RELIEF WHICH MAY BE GRANTED in a suit in chancery must be restricted to the issues formed by the pleadings. Hence if the suit is to restrain the prosecution, by defendant, of actions of ejectment or for specific performance, and if that is refused, for the allowance of the value of complainant's improvements on the property, the court cannot, in the absence of affirmative pleadings on behalf of the defendant, decree, after the cause has been submitted for decision, that the defendant be allowed to file a cross-bill, and upon the filing of such cross-bill on the same day, enter a decree against complainant for the possession of the property, and for a sum specified for the use, enjoyment, rents, and profits thereof.

JUDGMENT OR DECREE OUTSIDE OF THE ISSUES is to that extent without jurisdiction and void.

CHANCERY PRACTICE.—AN OPPORTUNITY TO ANSWER A CROSS-BILL must always be given the complainant, and he cannot be estopped from urging the denial of this right as a cause for the reversal of the decree by showing that his bill, and the evidence offered to support it, were such that he could not have answered the cross-bill without contradicting them.

SPECIFIC PERFORMANCE—UNCERTAINTY IN CONTRACT.—A promise that when the promisor shall obtain title to a certain tract of land, he will, for a small or nominal consideration, convey to occupants who have made improvements, without specifying the character or value of the improvements to be made, or the amount to be paid, is too uncertain to sustain a decree for specific performance.

SPECIFIC PERFORMANCE CANNOT BE DECREED IF THE CONTRACT LEAVES SOME OF ITS TERMS OPEN for future treaty, or to be afterwards settled.

SPECIFIC PERFORMANCE—CONTRACT MADE AS ADMINISTRATOR.—A contract purporting to be made by J. W. H., administratrix of the estate and guardian of the minor children of V. K. H., covenanting with the people of the town of B. that she will, upon obtaining a patent from the United States for the land upon which the said town is situate, sell to parties in possession certain lands upon the terms specified, on condition that no further delay is caused or expense incurred on account of affidavits or protests which have been or may be filed in opposition to such patent, does not entitle a land-holder to maintain suit for specific

performance against J. W. H. personally, she having succeeded to a part of the property as one of the heirs of V. K. H., because it is manifest from the contract that it was understood by the parties thereto that it would be performed by the promisor in her capacity of administratrix and guardian, and such performance was not possible.

A SIMPLE PAROL LICENSE MAY BE REVOKED by the licensor at any time, and is revoked by his death, or the sale of the real property involved.

REVOCATION OF LICENSE DOES NOT UNDO WHAT HAS BEEN DONE UNDER IT, nor make that unlawful which was lawful when done.

LICENSE TO TAKE POSSESSION AND TO ERECT IMPROVEMENTS UPON REAL PROPERTY results when a person having a possessory right causes it to be generally understood that he is glad to see buildings and other improvements put upon property, and that he will not regard nor treat as trespassers those who erect them and occupy his land.

A LICENSE COUPLED WITH AN INTEREST IS NOT REVOCABLE by the conveyance of the realty to which it relates.

A LICENSE MAY BECOME AN AGREEMENT FOR A VALUABLE CONSIDERATION, as where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the licensee has made improvements or invested capital in consequence of a license, he has become a purchaser for a valuable consideration.

LICENSE — PROTECTION OF, IN EQUITY. — When, by authority of a parol license, the licensee has been put in possession and induced to place valuable improvements on the land, of which he would be defrauded and robbed by the revocation of the license, equity will interpose, and either forbid the licensor to revoke the license, or impose such terms as will avoid fraud and accomplish what justice and good conscience demand.

FRAUD IS UNFAIR DEALING, and when, through inducements held out by one person, another is influenced to change his position so that he cannot be placed *in statu quo*, and will be seriously damaged unless the promise is fulfilled, then the refusal to perform is fraud.

LICENSE — RIGHTS OF PARTIES ON THE REVOCATION OF. — When a party has been permitted to enter upon land under an agreement that he may do so and erect improvements thereon, and that he would be allowed to purchase such land for a small or nominal consideration, and such agreement is not enforceable, because both parol and uncertain in its terms, and the license given to him to occupy is revoked, both he and the owner of the land must be treated as having an interest therein, and he should be allowed the value of his improvements, and such value should be made a lien on the property, and unless their value is paid into court for his use, the property should be sold, and the proceeds divided between him and the land-owner in proportion to their respective interests.

Charles N. Potter and J. J. Orr, for appellant.

William Wars Peck and Carroll H. Parmelee, for appellee.

CONAWAY, J. This is a suit for specific performance of certain alleged contracts for the conveyance of realty, and to enjoin the holder of the legal title from prosecuting actions of ejectment at law for the possession of such realty. Defendant and appellee, Juliet W. Hart, holds, and since June 28, 1884,

has held, the legal title to the property in question. Complainant and appellant, Ed. D. Metcalf, holds, and since an earlier date has held, possession of the same, claiming an equitable right thereto. The property consists of lots 1, 2, and 3, and the northerly five feet of lot 4, in block 1, and lot 11, and the southerly eight feet of lot 12, and the northerly six feet of lot 10, in block 18, in the town of Buffalo, Johnson County, Wyoming. All of this property was included in a desert-land entry made by Verling K. Hart, June 9, 1879. He died, intestate, February 17, 1883, having made final proof and payment, under his desert-land entry, September 27, 1882; and patent for the land was issued in his name, accruing to the benefit of his heirs, January 19, 1884. The legal title of defendant and appellee she derives as widow and one of the heirs of said Verling K. Hart, deceased, and by virtue of proceedings in the probate court of said county of Johnson for the settlement and distribution of the estate of her deceased husband. The other heirs are three minor children of herself and the deceased. The equitable title of complainant and appellant he derives from an alleged promise or agreement made by Verling K. Hart for the purpose of encouraging the building of a town upon the land included in his desert entry, that upon acquiring title he would sell and convey to each resident who should have improvements upon said land that portion occupied by such improvements, at a nominal or small price. Complainant claims that on account of such promise he occupied the land described as in block 1 in the spring of the year 1882, and then and afterwards made valuable improvements upon it. He also claims that the land described as in block 18 was occupied and improved in the summer of 1882 by one William Burgess on account of said promise of said Verling K. Hart, and with his knowledge, and without any objection by him, and that complainant succeeded to the rights of said Burgess by purchase in 1883, and has ever since held possession of this property. After the death of Verling K. Hart, and before the issue of the patent for the land included in his desert-entry, a number of the citizens of Buffalo made affidavits and protests against the issuing of the patent. This resulted in an instrument, in writing, in the form of a contract with the people of the town of Buffalo, dated September 20, 1883, and signed by Juliet W. Hart, who is described in the body of the instrument as administratrix of the estate and guardian of the minor children of Verling K. Hart, deceased, stating

terms and conditions upon which she would, upon obtaining a patent from the United States for the land upon which the said town is situated, sell to the parties in possession certain lots within said town. It is to be observed that the plat of this town dividing it into lots, establishing streets and alleys, etc., in fact, making it a legal, unincorporated town under the laws of the territory of Wyoming, was not filed in the office of the county clerk till July 29, 1884, more than ten months after the date of this alleged contract for the disposal of lots in the town. One of the conditions upon which Mrs. Hart so agreed to convey lots on the terms in the said instrument specified was that no further delay should be caused nor any expense incurred on account of affidavits or protests which had already been made, or which might thereafter be made, in opposition to the issuing of a patent by the United States for said land. Complainant claims also under this contract.

Before the commencement of this suit, defendant had begun two actions of ejectment against complainant for the possession of the realty described as in block 1 and in block 18, respectively. Complainant asks that defendant be enjoined from further prosecuting said suits, and asks for a decree for the specific performance of said alleged contracts for the conveyance to him of said realty, or if that be denied, that the value of his improvements be ascertained, and allowed to him, and made a lien upon the property. The answer of defendant denies that Verling K. Hart ever promised to sell or convey any portion of the land embraced in his desert-land entry upon obtaining patent therefor, to settlers making improvements, or to any person or persons, for a nominal price, or any price; denies that he ever encouraged or permitted such settlements or improvements to be made on the land; denies that he knew the improvements of complainant or Burgess were made; denies that the instrument of date September 20, 1883, is a contract which may be enforced; denies that the conditions upon which it was to take effect ever came to pass; and asks that she be dismissed, with costs. These, in brief, are substantially the issues made by the pleadings in this suit, and upon which the cause was tried, the evidence taken, and the cause argued and submitted in the district court.

A preliminary objection to the bill is made by defendant that the other heirs of Verling K. Hart, deceased, should have been made parties defendant; that the claim of complainant is a charge upon the interest of all the heirs in the real estate;

and that all should have been joined as defendants, to prevent a multiplicity of suits. It is sufficient to say, upon this point, that defendant herein alone is claiming the property, and that she alone brought the actions of ejectment against complainant for its possession. Complainant has a right to defend his possession by proper suits when assailed, and it occasions no multiplicity of actions to seek other relief in the same suit or suits.

It is also urged that complainant is chargeable with laches in not bringing his suit sooner, and therefore should not be allowed to prosecute his suit now. The delay is not claimed to have occurred since the commencement of the actions of ejectment by defendant. Any delay prior to that time is chargeable to her, at least equally with complainant. Some of the time was occupied with mutual negotiations for settlement, and, besides, complainant was in possession of the property. If wrongfully so, it was incumbent on defendant to put him out of possession without undue delay, at least to as great an extent as it was upon him to perfect his title.

The court below found in favor of defendant; found that the possession of complainant was wrongful and tortious since June 28, 1884, and dismissed his original and amended bills; and, among other things, gave judgment against him for costs. So far this is just the relief, and all the relief, sought by defendant in her answers to complainant's original and amended bills, and leaves her at liberty to prosecute her actions of ejectment for the possession of the property, and for damages for its detention, if she so desire,—causes of action which might be joined by the law in force at the time these actions were begun and still in force. And this would seem to be an adjudication upon all of the issues made by the pleadings. But the court below did not stop here. In its decree is embodied an order allowing defendant to file a cross-bill. Accordingly, we find a cross-bill of defendant indorsed as filed the same day of the rendering of the decree, December 13, 1889. We also find that the motion for leave to file this cross-bill was made only the day before, and taken under advisement by the court. Under the issues in the cause (for no issue was made, or could have been made, under this cross-bill), all the relief asked for by defendant was "to be hence dismissed, together with her reasonable costs and charges in this behalf incurred and sustained." When the two actions of ejectment were begun, and when this suit was begun, the

law practice and chancery practice were separate. The defense in this suit, up to the day before the rendering of the decree, was evidently conducted upon the idea that it was best for defendant's interest not to ask any affirmative relief in this suit, but merely to oppose and defeat complainant's application for a conveyance of the property, and for an injunction, and then proceed to assert her legal title, and to prosecute her actions for possession and damages on the law side of the court, unencumbered by equitable considerations or defenses,—a course which would seem to commend itself to any prudent practitioner. Defendant may have desired a jury trial in those actions, to which either party was entitled, and which would have been specially appropriate in the assessment of damages, rental values, etc. But this cross-bill asks, additionally, for a judgment and decree against complainant, Ed. D. Metcalf, for the possession of the property, and for nine thousand dollars for the use, enjoyment, rents, issues, and profits thereof, and for interest on this sum from March 31, 1887; and the decree contains a finding and judgment in favor of the defendant for the possession of the property, and for the value of the use, enjoyment, rents, issues, and profits thereof, from September 5, 1885, and orders a reference to a master to take testimony and ascertain those values. These values had not been ascertained, because they were not in issue.

What induced this very radical change in the views of defendant as to the relief she ought to seek in this particular suit, the transcript of the record before us does not disclose. But the brief of her counsel filed herein informs us that the case was heard at the June term, 1889, of the district court, and reserved for consideration, and that in September, 1889, the district judge filed an opinion. This opinion is quoted at length in the brief. No cross-bill had then come to light. The pleadings were the original and amended bills of complainant, considered together as one bill, it seems, without objection, and the answers thereto by defendant, and the replication by complainant. The complainant claimed in his pleadings, and endeavored to show by his evidence, that he was entitled to an injunction restraining the possessory actions at law of defendant upon her legal title, and to a conveyance of the property in controversy to him from defendant, or, if this should be denied, at least to the value of his improvements. The pleadings and proofs on the part of

the defendant were intended to show the contrary of all this, and that defendant should be dismissed, with costs, and left at liberty to pursue her actions at law. For this she asked, and for nothing more. The opinion of the learned chancellor who tried this cause in the court below was against the complainant on every branch of his case, and denied him all of the relief sought. It also indicated that a decree should go against him for the possession of the property, and for rent from date of defendant's commencing the suits of ejectment, or from September 7, 1885, whichever was earliest; and that complainant should be allowed nothing for improvements, but should be allowed for taxes actually paid by him. The opinion then proceeds: "The cause having been brought in equity to enjoin the prosecution of an action of ejectment, and to compel a conveyance of the property, it falls within that category of cases where the chancellor, being possessed of the whole case, shall render all the relief to which the parties are entitled." This principle is entirely correct, but it applies just to the "whole case," and nothing else. And the "whole case" is just the case made by the pleadings, and is constituted of the issues formed by the pleadings, and nothing else; and the relief which the chancellor may render is such, and only such, as the parties show themselves entitled to by their pleadings, and by evidence pertinent to those pleadings; and the prayer for relief is part of the pleadings.

In this case, at the time of the filing of this opinion of the chancellor, there was no prayer for affirmative relief by defendant at all. She had filed no cross-bill; neither any pleading setting up grounds for or claiming affirmative relief. As already stated, she merely asked to be dismissed, with costs, and she made no prayer for general relief. The rule upon this subject, in which all the authorities concur, is well stated by Black in his recent valuable work on judgments: "According to the settled practice in equity, the rule in regard to decrees is similar to that just stated as governing judgments at law, viz., that it is error to decree relief not sought in the bill. In other words, if the complainant has prayed for specific relief in the premises, or relief as to a specific subject-matter, no more extensive relief can properly be accorded to him": 1 Black on Judgments, sec. 141. This language mentions complainants only, but the same rule applies to defendants when they seek affirmative relief. They then become complainants in effect, if not in name. There are

some authorities to the effect that relief may be granted which is not asked for in the formal prayer for relief, but such relief must be within the issues, and the bill somewhere must show that the party is entitled to it, even where there is a prayer for general relief. Further, a judgment or decree outside of the issues is without jurisdiction, and void. We quote again from Black: "Besides jurisdiction of the person of the defendant and of the general subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which the judgment assumes to decide, or of the particular remedy or relief which it assumes to grant. In other words, a judgment which passes on matters entirely outside the issue raised in the record is so far invalid": Black on Judgments, sec. 242. There was no issue joined or tendered in this case as to the right of possession. The issue was as to the conveyance of the bare legal title to one who already had possession, under claim of the equitable right to both title and possession. There was no issue as to rents and profits. All that was said by defendant in her pleadings upon that subject when the case was tried was in the concluding paragraph of her answer to the original bill, in these words: "And defendant further says that complainant has derived great benefit and emolument from the use of said premises, much greater than the value of any improvements by him placed thereon, for which this defendant, nor Verling K. Hart, deceased, ever received the slightest compensation. Wherefore defendant asks to be dismissed, with her costs and reasonable charges in this behalf incurred." Such was the state of the case at the June term, 1889, when the case was tried and submitted. Such was the state of the case in September, 1889, when the opinion of the learned chancellor was filed. How was it on December 18th of that year, when the decree was rendered?

It would appear that defendant, finding relief which she had not sought in the case about to be cast upon her, endeavored to prepare a pleading to sustain the proposed decree. On December 12th she presented her cross-bill, and moved for leave to file it. This motion was taken under advisement. The next day the decree in the cause was rendered, including an order sustaining defendant's motion for leave to file her cross-bill, and granting her all the relief asked for in her cross-bill, except interest. From this decree complainant appeals. The statute in regard to cross-bills, in force when this

suit was begun, and under which it must be concluded, is found in the Compiled Laws of 1876, as follows:—

"Sec. 681. Any defendant may, after filing his answer, exhibit and file his cross-bill, containing his interrogatories to the complaint or complaints [complainant or complainants is evidently meant], and call upon him or them to make answer thereto. In such case, the complainants shall be held to answer, plead, demur, or except to such cross-bill in the same manner and under the same penalties that a defendant or defendants are hereinbefore required to answer, plead, demur, or except to an original bill. If the cross-bill is filed in term time, the complainant or complainants shall answer within such time as the court may order; if filed in vacation, the complainant or complainants shall answer such cross-bill within the time hereinbefore prescribed for defendants to answer original bills; and the issuance, service, and return of subpoenas, or publication of notice in case of non-residents, shall be the same as hereinbefore provided in the commencement of actions in chancery."

The argument of defendant is, that this section, by its terms, applies only to cross-bills seeking discovery. The interrogatory clause is omitted from defendant's cross-bill. Therefore, it is claimed, this section does not apply, and the common-law rule governs. If this be so, which is not admitted, no common-law rule has been shown denying complainant the opportunity to answer a cross-bill. It is further argued that the relief sought by the cross-bill is only such as results to defendant from her successful denial of complainant's original and amended bills, and such as might have been claimed in her answers to those bills, and therefore her cross-bill admits of no answer. This is a *non sequitur*. Admitting that the claims for the very important affirmative relief demanded by the cross-bill might have been set up in the answer of defendant, they would then have been denied by the replication, and would have been in issue when the cause was tried and submitted. As it is, they have never been in issue at any time.

The doctrine of estoppel is invoked against complainant. It is claimed that, by his pleadings and proofs already in the record, he would be estopped from setting up any possible defense to the matters alleged in the cross-bill, if allowed the opportunity. After stating, in their brief, matters which they consider established by complainant's pleadings and proofs,

defendant's attorneys say: "He was estopped from denying any of these facts; he could have answered only by denying them." We are not prepared to say, as matter of law, that every possible defense that complainant might make to the new matter of the cross-bill, or any portion of it, is admitted away by his pleadings or proofs upon other issues. Were such a thing possible, even then complainant would have a right to an opportunity to answer the cross-bill, if he could do nothing more than confess a decree, and save additional costs. In other branches of the case defendant's attorneys have shown great industry in citing numerous authorities to support their positions. To sustain their argument that complainant was not entitled to an opportunity to answer defendant's cross-bill, they have not cited one. It is not likely that such an authority can be found in the history of English or American jurisprudence. The statement of the proposition is its own refutation. No argument can make the error plainer. The decree in this case, in awarding to defendant possession of the property in question, and in awarding process to put her in possession, and in awarding to her rent, goes outside of the issues as shown by the record. It is as if a man and his wife should be parties to a suit involving her homestead rights, and evidence should be admitted tending to show incidentally that they were not living happily together, and the court should proceed of its own motion to divorce them. The decree in this case, for error in attempting to adjudicate on matters not in issue, must be reversed.

The decree has also adjudicated the matters properly in issue; that is, the question of the specific performance of the alleged contracts, the question of compensation for complainant's improvements, and the question of enjoining the prosecution of the two actions of ejectment. It is therefore necessary to examine this adjudication, and to determine as to its correctness.

As to the alleged contract of Verling K. Hart to give title, when he should himself obtain title by patent, to occupants of the land who had made improvements thereon. At the time these promises or representations were made, Hart had no title, and could give none. It is not alleged that he promised to procure title, or to make any effort to procure title. This consideration, while not conclusive, seems unfavorable to complainant's equities. Neither is there any allegation or proof as to the amount or character of improvement that would

be required of the settler to entitle him to the benefit of the alleged promise. Improvements are spoken of, and the building of a burgh. An improvement might be a large business house or a pig-sty; and the building of a burgh might consist, in part, in the erection of one or the other, or both. It would seem that Hart considered that he had a right to object to the construction of inferior buildings on his land, and in one case intimated that he did not regard such as entitled to consideration. Neither is the quantity of land fixed to which a settler would be entitled on account of improvements of any character. Fischer speaks of a lot. McCray mentions improved lots and adjoining lots as though two lots were intended to accompany each "improvement." Neither is any price fixed. It was to be a small price or a nominal price. Large latitude is not excluded by these terms. In McCray's testimony he speaks of a nominal figure that would about pay the expense of platting, etc., and says he thought ten dollars for improved lots, and twenty-five dollars for adjoining lots, too low; that he would fix the figures at twenty-five dollars, and forty or fifty dollars. It may well be doubted whether the settlers generally would consider these prices nominal, or whether they can properly be called nominal; and McCray mentions one amount as a nominal price for improved lots, and a different and larger amount as a nominal price for adjoining lots. These terms, "nominal prices" and "small prices," leave much room for controversy. A contract cannot be specifically enforced when it leaves any of its terms open to future treaty, or to be afterwards settled. These elements of incompleteness and uncertainty in the alleged contract are fatal to a claim for specific performance.

This brings us to the written instrument of September 20, 1883. The first clause of this instrument reads as follows: "Know all men by these presents, that I, Juliet W. Hart, administratrix of the estate and guardian of the minor children of Verling K. Hart, deceased, do hereby covenant and agree to and with the people of the town of Buffalo, Wyoming, that I will, upon obtaining a patent from the United States for the land upon which the said town is situated, sell to the parties in possession certain lots within said town upon the following terms and conditions." Then follow the terms, and the closing clauses are the following:—

"All of which is covenanted upon condition that no further delay is caused, or any expense incurred, on account of affi-

claims or protests which have already been made, or which may hereafter be made, in opposition to the issuing of a patent by the United States for said land.

"Witness my hand and seal, this twentieth day of September, A. D. 1883.

JULIET W. HART.

"Witness: H. S. ELLIOTT."

This contract is signed, simply, "Juliet W. Hart." This suit is brought against Juliet W. Hart. It is thus treated as the individual contract of Juliet W. Hart,—as her individual covenant and agreement, upon obtaining a patent from the United States, to sell certain portions, or it may be uncertain portions, of the land. That contingency, upon which this contract was to take effect, if this view be the correct one, has never occurred. Juliet W. Hart never obtained a patent for the land.

It may be said that Mrs. Hart was endeavoring to secure the issue of the patent upon the desert-land entry of her deceased husband, and that the phrase, "obtaining a patent," in the contract, merely means so securing the issue of that patent. There are many things to sustain this view. This is the patent which all the parties interested were discussing. This is the patent, the issue of which the citizens were opposing. This is the patent which defendant, Mrs. Hart, sought to free from further opposition. This patent seems to have been regarded by the people as empowering Mrs. Hart, as administratrix, to sell portions of the land. It had not occurred to Mr. Elliott that this was not the case, and he represented the people of Buffalo. If such is the meaning of the phrase, "obtaining a patent," in the contract, then the contract is one which it was and is simply impossible to perform according to its terms. The issue of the patent to Verling K. Hart gave Juliet W. Hart no power or authority to sell or convey any of the land. It gave her no such authority, either individually, or as guardian, or as administratrix, or as widow and heir, or in all four capacities put together. It may be said that Mrs. Hart, having contracted to sell and convey property to which she had no title at the time, on afterwards acquiring title from any source, should be held to sell and convey according to her contract; that the source of the title is not material; that the qualification, "upon obtaining a patent," in the contract, is not a material part of the contract, and may be rejected as immaterial or as surplusage, and the contract enforced without it. This is dangerous ground. Such a course, in this

case, would evidently change the meaning and intent of the contract from what was in the contemplation of the parties at the time it was made and accepted. The parties evidently acted under the impression that, upon the issuing of the patent to Verling K. Hart, Juliet W. Hart, as administratrix of his estate, could convey out of such estate, before distribution, the portions of the realty belonging thereto which are called for by this alleged contract. This would have reduced the estate to the diminution of the inheritance of all the heirs in proportion to their interest. This is evidently what was intended, and not that the contract should be filled out of the share of one heir after distribution. It could not be known, when the so-called contract was made, which heir would get the property described, or whether any of them would. It might have been necessary to sell it to pay intestate's debts. The time fixed for the performance of the contract, "upon obtaining a patent," sustains this view, and it is consistent with no other. No time is allowed for distribution. No such contingency was provided for, or, it seems, thought of. If the phrase in the contract, "obtaining a patent," means the issuing of the patent to Verling K. Hart, then it follows, from the foregoing considerations, that the contract cannot be enforced according to its true intent and meaning. If the phrase has its natural meaning, according to the order and sequence of words in the contract where it occurs, and means the obtaining of a patent by the contracting party, Juliet W. Hart, in her own right, then that contingency upon which the contract should take effect has never occurred. In either view, the action for specific performance must fail. There are other considerations leading to the same result, but these seem to be controlling and conclusive.

Then the question remains, What is the true relation of this complainant to the property which he has held all these years? Is he a trespasser? or is his possession rightful? He is not in possession by contract. Is he lawfully in, by permission of the party who had a right to give it? This brings us to the questions of license and equitable estoppel.

"License" is defined by Abbott to be, in its general sense, permission; consent that a person may do some act which, without such consent, he might not lawfully do; an authority to do some one act, or series of acts, on the land of another, without possessing any estate in the land. Bouvier's definitions of the term "license" are substantially the same.

These definitions, like most short definitions, are incomplete. A license may be to do some act, without going on the land of another, which will interfere with the owner's possession, enjoyment, or control; and a license may result from approval of acts of the licensee after they are done, as well as from permission previously given. Verling K. Hart, by his desert-land entry of June 9, 1879, acquired the right of possession of a tract of land, including that upon which the town of Buffalo was afterwards built. As he told several parties, he could give them no title under that entry. He could, however, waive his possessory right, if he chose to do so, and give them permission to enter upon his "claim," occupy portions of the land, and build there. The question is, Did he do it? and if so, did such permission inure to the benefit of this complainant, and to what extent? The solution of these questions requires an examination of the evidence.

A. J. McCray testifies that he conversed with Hart in March or April, 1881. Said to Hart that he supposed they were building a town on his (Hart's) land, or what would be his land; that a few of them had gone ahead and started a little burgh, not knowing what the future would be, or where a title was to come from. Asked Hart if Snyder was his authorized agent. Hart said Snyder was his authorized agent, and that he would abide by what Snyder did; and that if what few men were there made a little burgh, he would do all he could to assist them in improving the property, and that they should have titles at a nominal figure when he was able to convey to them. At this time complainant was not at Buffalo; neither was Burgess. McCray told this to a number of the settlers. He also talked with Hart on the subject in the fall of 1882, and Hart then expressed himself as greatly surprised and pleased at the progress the town had made, and again assured him that the people would have no difficulties in procuring titles as soon as he could convey them. By this time both complainant and Burgess were there, and had erected improvements. John A. Fischer talked with Hart upon the subject repeatedly in 1881 and 1882. Hart told him he would like to see people come to Buffalo and settle, and if he (Fischer) could influence parties or friends on the railroad to come, he would be glad if they would settle there and make a town; that mechanics, blacksmiths, shoemakers, or all good people that would locate there he would give a lot, after the town was laid out properly, for very little expense. In an-

swer to the question whether this was generally known, Fischer says: "Yes, sir; it was known. Most everybody expected the first settlers had their lots for nothing. . . . I think the expenses were attached to recording. The people had to stand that, as I understood from Colonel Hart." George W. Munkers, probate judge and treasurer, talked with Hart at Buffalo in the fall of 1882, and asked "the price of ground." Hart declined to give any positive answer, as he had not title, but answered that the "price would be very nominal." Munkers says: "He conveyed the idea to me that the parties first building he was willing to encourage them, for a nominal sum for the land. There is no testimony conflicting with this, but other testimony which corroborates it. None of these declarations of Hart's were confidential. They were not personal to the parties to whom they were made. Hart's assurances to McCray were for the men who built a burgh; to Fischer, in favor of mechanics, and all good people who would come and settle there; to Munkers, in favor of those first building. The understanding of Hart with his partner, Snyder, and which was made public, was for the benefit of those who should have buildings in the limits of the town when the survey should be made.

These matters were all made public, and were intended to be made public, and were intended to influence the people generally. They were not confined to people at or near Buffalo at the time. Hart requested Fischer to make them known on the railroad, a great distance away, and influence people to come and settle at Buffalo. E. U. Snyder, sheriff of the county, and partner and agent of Hart at and before the location of the town of Buffalo, states the situation fairly and fully. He says: "In the years 1879 and 1880 we were strongly opposed to any one building on this claim, but after we were satisfied there would be a town built, and came to the conclusion to survey and plat the same, it was agreed and understood by us that all parties that had buildings on lots at the time of the survey should have the lots at a small price; the amount I don't think was mentioned." He cannot fix the exact time when this was first made public, but it was talked over about a couple of years before Hart's death (February 17, 1883), and made public from that time. It was generally understood. He told a number of persons himself. No plainer invitation to occupy ground and to erect buildings thereon, prior to the proposed survey, could be

made. The intention to include as beneficiaries all who should build prior to the proposed survey could not be made plainer. It was also an approval of the erection of the buildings already there. The declarations of Hart, and the agreement between Hart and his partner and agent, Snyder, in favor of the settlers, were made public, and were intended to reach and influence others besides those to whom the declarations were directly made. The substance of them became known to complainant. He got his information, as he says, from the oldest citizens. He, with them, was content to take his title through Hart, if Hart perfected his title, of which there was some doubt. If he did not, they still had the resource open of proceeding under the town-site law. It became known to complainant that Hart expressed himself as glad to see buildings put up. The public declarations of Hart, and his conduct, were admissions that the settlers were not trespassers; that they were rightfully there, with his permission and approval. He did not treat the settlers as trespassers. He made them welcome. He assured them of his good-will and of his approval of their occupation and improvement of the proposed town site, and of his assistance in the future. It is not material that he did not talk to each individual personally. His language was general. He talked to a few for all. When he saw the town in the fall of 1882, the improvements of Burgess, and part of the improvements of Metcalf, were there. Hart did not stop to inquire who the men were who had built the town, but expressed his gratification with what had been done. Such declarations and conduct come under the head of unsolemn admissions as classified and defined by Greenleaf: "Those which have been acted upon, or have been made to influence the conduct of others, or to derive some advantage to the party, and which cannot afterwards be denied without a breach of good faith": 2 Greenleaf on Evidence, sec. 27. Again: "Admissions, whether of law or fact, which have been acted upon by others, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. It is of no importance whether they were made in express language to the person himself, or implied from the open and general conduct of the party; for in the latter case the implied declaration may be considered as addressed to every one in particular who may have occasion to act upon it. . . . The latter class comprehends not only these declarations, but also

that line of conduct by which the party has induced others to act, or has acquired any advantage to himself": 2 Greenleaf on Evidence, sec. 207. The conduct of Hart, as well as his language, was an admission that the settlers were rightfully in possession of their improvements, and with his approval and consent. The evidence that the settlers in Buffalo, prior to his death, erected and held possession of their improvements with his knowledge and approval and consent, is abundant and satisfactory. There is no evidence to the contrary. There is nothing to show that he ever revoked this license. A simple license may be revoked by the licensor at any time. It is revoked by his death. It is also revoked by a sale of the realty involved. But in neither case does its revocation undo what has been done under it, or make that unlawful which was lawful when it was done. The license given by Verling K. Hart to occupy and improve the town site of Buffalo was revoked by his death, which occurred February 17, 1883. Any holdings taken possession of after that time cannot be protected by that license. But any taken before that time may be, if other facts warrant it; and valuable improvements placed upon portions of the land before that time by virtue of such license were placed there lawfully. So far there can be no question. Then, what was the effect of such occupation and improvement under that license?

The subjects of license and easement have been fruitful sources of litigation. There has been a difficulty recognized in distinguishing between the two. "An easement," says Mr. Angell, in his able treatise on watercourses (p. 316), "it has appeared, is a liberty, privilege, or advantage in land, without profit, and existing distinct from the ownership of the soil; and it has appeared, also, that claim for an easement must be founded upon a deed or writing, or upon prescription which supposes one. . . . A license, on the other hand, is a bare authority to do a certain act, or series of acts, upon another's land, without possessing any estate therein; and, it being founded in personal confidence, it is not assignable, and it is gone if the owner of the land who gives the license transfers his title to another, or if either party die." This definition of a license, as well as of an easement, is adopted by Chancellor Kent (8 Kent's Com. 452), and is expressly recognized by the most approved English and American authorities: *Thompson v. Gregory*, 4 Johns. 81; 4 Am. Dec. 255; *Mumford v. Whitney*, 15 Wend. 380; 30

Am. Dec. 60; *Cook v. Stearns*, 11 Mass. 533; *Miller v. Auburn etc. R. R. Co.*, 6 Hill, 61; *Fitch v. Seymour*, 9 Met. 482; *Hays v. Richardson*, 1 Gill & J. 366; *Fentiman v. Smith*, 4 East, 109; *Hewlins v. Shippam*, 5 Barn. & C. 221; *Thomas v. Sorrell*, Vaughan, 351; *Wood v. Leadbitter*, 13 Mees. & W. 843. While it has been uniformly held that a parol license, while it remains executory, may be revoked at pleasure (*Cook v. Stearns*, 11 Mass. 533; *Mumford v. Whitney*, 15 Wend. 380; 30 Am. Dec. 60; *Fentiman v. Smith*, 4 East, 109; Angell on Watercourses, 319, 324), yet when executed, whether it is revocable, and if so, how far, and to what extent, has been a question fraught with much difficulty, and respecting which different courts of the highest respectability have held very differently: *Hazleton v. Putnam*, 3 Pinn. 108; 54 Am. Dec. 158.

The first part of this definition applies to a mere naked license without consideration. Such a one has been considered as founded on personal confidence, and not assignable, and revocable at the will of the licensor. But the cases are numerous of licenses founded upon valuable consideration, where the motive of personal confidence, if it existed at all, is a very subordinate one. The material question is, whether permission to go upon the land of the licensor, and do any act or series of acts there, was actually given, either expressly or by implication. In this case we have seen that such permission was given, and that the occupation and improvement of the property was ratified by the language and conduct of Hart, the licensor, after considerable expenditures had been made by the licensees, Metcalf and Burgess. As already stated, the general doctrine of the common law has always been, and is now, that a simple parol license is revocable at the will of the licensor, and is revoked, *ipso facto*, by the transfer of the realty by the licensor, or by his death, or by an assignment of the license. The conflict of authority already mentioned is principally among the common-law courts. Courts of chancery have not developed nearly so much conflict. But even the law courts hold with much unanimity that a license by parol, as well as written, when coupled with an interest, becomes irrevocable, except in cases where such irrevocability would conflict with some other rule or principle or policy of the law. In such cases there is a conflict of opinion in courts of the highest respectability as to which rule should give way. The rule under consideration is laid down by the supreme court of the United States (opinion by

Chief Justice Marshall), in *Hunt v. Rousmanier*, 8 Wheat. 203: "This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an interest, it survives the person giving it, and may be executed after his death." And similarly, a license coupled with an interest is not revocable by a conveyance of the realty to which it relates. This appears from *Hunt v. Rousmanier*, 8 Wheat. 203, and there is no conflict of authority upon that point, except as stated above, where some other rule or principle intervenes, such as the statute of frauds. It should be remembered that a license is a power. The difference between a simple license and a license coupled with an interest is clearly set forth and illustrated by Chief Justice Vaughan in *Thomas v. Sorrell*, Vaughan, 350, in the following language, which has been extensively quoted, and always with approval: "A dispensation, or license, properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which, without it, had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after, to his own use,—are licenses as to the acts of hunting and cutting down the tree; but as to the carrying away of the deer killed and the tree cut down, they are grants." And Baron Alderson, in *Wood v. Leadbitter*, 13 Mees. & W. 843, says that "a license by A to hunt in his park was revocable, whether given by deed or parol, and merely renders the act of hunting lawful, which, without the license, would have been unlawful. But if the license, as in the case put by Chief Justice Vaughan, was a license not only to hunt, but to take away the deer when killed, as the property or to the use of the licensee, then, if the grant of the deer was good, the license would be irrevocable, because the person who gave it would be estopped from defeating his own grant." A common case of this nature in America is that of a parol license to cut and carry away timber. When, in pursuance of the license, the timber has been cut, the license cannot be revoked so as to prevent the licensee from carrying it away, or to enable the licensor to maintain trespass against the licensee for going upon his premises for that purpose, or to enable the licensor to maintain trover for the

timber; and one who sells goods which are upon his land, or brings the goods of another upon his land, or permits the owner to do so, gives the latter an implied authority to enter for the purpose of taking the goods away, which the licensor cannot recall. The license is supported by the interest with which it is coupled. These are all instances of a license to do particular acts upon the realty of another, not involving any permanent occupation of the land, or the exercise of any permanent or continuous control over it, amounting to an easement or an estate in it.

But instead of oral permission to leave goods on the land of another for safe-keeping or other purpose, and to enter upon the land, it may be repeatedly, to take them away, suppose oral permission is given to build a house there, and to enter at will upon the land, and hold it for the purpose of occupying, using, and enjoying the house, without limit as to time. This is the creation of a permanent interest or estate in or upon the land, which, by the common law and the statute of frauds, cannot be created without writing. It is not doubted that such a parol license would be valid, and would be sufficient authority to justify the party acting upon it in building the house and occupying the premises so long as the license remains in force. There is no difference of judicial opinion upon this point. "License" is defined to be a power or authority, and so long as the license is not countermanded, the licensee is acting in the licensor's own right, and in his stead. *Qui facit per alium, facit per se*. The point of divergence in the authorities is the question whether such licenses, when executed in whole or in part, and at considerable expense incurred on the faith of the license, are revocable at common law; whether they are revocable at the will of the licensor, notwithstanding the consequent loss of the licensee of expenditures made in good faith; and whether they are, *ipso facto*, revoked by the death of the licensor, or by the transfer of the property by him, or by the transfer by the licensee of his interest.

The early English cases of *Taylor v. Waters*, 7 Taunt. 374, and *Wood v. Lake*, Sayers, 8, held such licenses irrevocable. But these cases were overruled in the later cases of *Hewlins v. Shippam*, 5 Barn. & C. 221, and *Wood v. Leadbitter*, 13 Mees. & W. 837; and since the latter case it has been the doctrine of the English law courts that an oral license to enter upon realty and make improvements cannot be made to operate as

a valid grant of a permanent interest or estate or easement in the realty, although executed, in whole or in part, by the licensee, and even at great expense. This doctrine of the English law courts has been quite extensively adopted in the United States. The case of *Cook v. Stearns*, 11 Mass. 533, decided in 1814, has become a leading case in this country. It is an action of trespass *quare clausum fregit*, and adopts the English rule strictly. Massachusetts having no chancery courts, it might have been expected that there, as in Pennsylvania, the law courts would undertake to administer equitable relief under the common-law forms; but it seems that such was not the case. The case was tried simply as an ordinary action at law, without an intimation, either in the opinion of the court or the briefs of counsel, that any equities could possibly be considered. The case of *Mumford v. Whitney*, 15 Wend. 381, 30 Am. Dec. 60, decided in 1836, also strictly follows the common-law rule. It was an action on the case at law, and there seems to be no reason apparent why it should not follow the common-law rule. Other cases sustaining the proposition that a parol license, although executed, cannot operate as a grant of an interest in real estate, are *Ruggles v. Lesure*, 24 Pick. 187; *Stevens v. Stevens*, 11 Met. 251; 45 Am. Dec. 203; *Foot v. New Haven etc. R. R. Co.*, 23 Conn. 214; *Bridges v. Purcell*, 1 Dev. & B. 492; *Miller v. Auburn etc. R. R. Co.*, 6 Hill, 61; *Carter v. Harlan*, 6 Md. 20; *Carleton v. Redington*, 21 N. H. 291; *Seidensparger v. Spear*, 17 Me. 123; 35 Am. Dec. 334; *Thompson v. Gregory*, 4 Johns. 81; 4 Am. Dec. 255; *Simpkins v. Rogers*, 15 Ill. 397; *Woodward v. Seely*, 11 Ill. 157; 50 Am. Dec. 445; *Kamphouse v. Gaffner*, 73 Ill. 461; *Tanner v. Volentine*, 75 Ill. 628.

But the decisions of the law courts have not been at all uniform upon this question. Some of them have applied the doctrine of equitable estoppel when necessary to prevent fraud, and have not allowed the license to be revoked. But probably the weight of authority is with *Cook v. Stearns*, 11 Mass. 533. But the case at bar is a suit in equity, and the question is, not what is the legal doctrine, but what is the equitable doctrine. And every authority in favor of applying the doctrine of equitable estoppel in a law court applies *a fortiori* in a court of equity. But the refusal of a court of law to apply such doctrine is no authority against applying it in equity. In a number of cases at law involving the question under consideration, courts and judges, recognizing the harshness of

the established legal rule, have suggested that equity might furnish relief. See *Den ex dem. v. Baldwin*, 21 N. J. L. 395; *Foot v. New Haven etc. R. R. Co.*, 23 Conn. 214; *Bridges v. Purcell*, 1 Dev. & B. 492; *Prince v. Case*, 10 Conn. 375; 27 Am. Dec. 675; *Benedict v. Benedict*, 5 Day, 469; *Foster v. Browning*, 4 R. I. 47; 67 Am. Dec. 505. The following note to *Hall v. Chaffee*, 18 Vt. 157, by Judge Isaac F. Redfield, is suggestive. He says: "I have no doubt many cases, both English and American, may be found, and those of high authority, which either directly or indirectly recognize the doctrine that a parol license to enjoy an easement growing out of land, when once executed, becomes irrevocable, and the right thus acquired permanent: [Authorities cited.] But I apprehend the just weight of authority, both English and American, in regard to the rights of the parties at law, is, that such license is within the statute of frauds, and, unless in writing, countermandable at will, even when executed so as to make any further enjoyment of the easement a ground of action. If such a license be given by parol, and expense incurred upon the faith of it, so that the parties cannot now be placed in *status quo*, there would seem to be the same reason why a court of equity should grant relief, as in any other case of part performance of a parol contract for the sale of land or any interest therein, i. e., to prevent fraud."

But, as already intimated, the law courts have not, by any means, in all instances, or even very generally, contented themselves with referring parties to the equity tribunals for relief in cases involving a breach of faith on the part of the licensor, and consequent irreparable damage to the licensee. A number of our American law courts have seized upon and adopted the doctrine of equitable estoppel, by which they have been enabled to administer relief indirectly in cases which otherwise would not lie within the scope of their powers: *Ricker v. Kelly*, 1 Me. 117; 10 Am. Dec. 38; *Clement v. Durgin*, 5 Me. 9; *Ameriscoggin Bridge v. Bragg*, 11 N. H. 102; *Woodbury v. Parshley*, 7 N. H. 237; 26 Am. Dec. 739; *Sheffield v. Collier*, 3 Ga. 82; *Wilson v. Chalfant*, 15 Ohio, 248; 45 Am. Dec. 574; *Snowden v. Wilas*, 19 Ind. 10; 81 Am. Dec. 370. And where the law courts have not gone so far as to adopt the doctrine of equitable estoppel in such cases, they have very generally established the doctrine that buildings may, by permission of the owners of the soil, be erected thereon without becoming part of the inheritance; and that the person erect-

ing them, when excluded from their possession and use, should have some remedy, that he should not lose the product of his labor entirely. "The existence of a right of property in a building, apart from the title to the soil, necessarily involves the conclusion that the person in whom it is vested may remove the building if he is obliged to surrender possession of the land. It has consequently been decided that a house or shop erected on the land of another, under a license which is subsequently withdrawn, may be removed by the person who put it up: *Doty v. Gorkam*, 5 Pick. 487; 16 Am. Dec. 417; *Wells v. Banister*, 4 Mass. 514; *Fuller v. Tabor*, 39 Me. 519; or its value recovered in trover, if the owner of the soil forbids or prevents its removal: *Russell v. Richards*, 10 Me. 429; 25 Am. Dec. 254; 11 Me. 371; 26 Am. Dec. 532; *Osgood v. Howard*, 6 Me. 452; 20 Am. Dec. 322."

But the true field for the administration of justice in such cases is in equity. We have already given the *dictum* of Judge Redfield upon the subject under consideration, which he put in a note to *Hall v. Chaffee*, 13 Vt. 157, an action at law. That eminent jurist afterwards had occasion to set forth his views of the equitable doctrine in such case, in an opinion where they are not *dicta*. The case of *Pope v. Henry*, 24 Vt. 560, decided in 1852, was a suit in chancery. Judge Redfield delivered the opinion of the court. His remarks upon the interest or title of the defendant, Henry, explain themselves. They are as follows: "Without saying more in regard to the title of the plaintiff, we proceed to the examination of the title of the several defendants, each of which stands upon peculiar grounds. In regard to that of defendant, Henry, it originated in a mere license to take water, by some kind of a duct, sufficient to carry certain machinery, which, in faith of the license, he subsequently erected, and had continued to occupy as his own for more than fifteen years before the bringing of the bill. This, we think, gives him an equity against all the world to be reimbursed for the value of his whole erections by the person taking them before he could be deprived of them. It is one of the first principles of the Roman civil law in regard to real estate, and valuable erections and 'meliorations,' as they are called, put thereon by the occupier in faith of a title which subsequently failed for any cause, that one thus benefited by the labor of another should make reasonable compensation. And the same principle has been very early incorporated into the English chancery law.

This right clearly exists in Henry, without regard to his ultimate title. . . . Possession taken under a license to occupy permanently, either absolutely or under certain conditions, gives, in equity, a title to the premises, according to the terms of the license. And this contract being partly performed or fully performed on one part by permanent erections of considerable value, a court of equity will decree an assurance of the title stipulated. And the party being in possession under the license is notice to a subsequent purchaser or encumbrancer of whatever title the one in possession may have, whether legal or equitable." So different is the language of equity from that of the law when expressed by the same courts and the same judges.

In the state of New York the case of *Mumford v. Whitney*, 15 Wend. 381, 30 Am. Dec. 60, speaks of the language of her law courts. The following very complete and accurate syllabus of a suit in chancery gives, in brief, the language of her courts of equity. "Bill for specific performance of an agreement to sell or lease land. The appellants had entered upon the land under an assignment of a license given by the respondent to occupy and improve the land. They afterwards surrendered that license to the respondent, who gave them a written memorandum, authorizing them to possess the land, and promising to give them the preference to purchase or lease the land. It was proved that at various times the respondent had encouraged the appellants to improve and build on the land, by assurances that no advantage should be taken of their labor, and that when his title was perfected, by a partition of the land, they should have a lease in fee, or a deed at the rate wild lands were selling. The respondent in his answer denied any other agreement than the memorandum, and relied on the statute of frauds. It was held that the appellants having gone on the land and made improvements, this was a part performance, and took the case out of the statute; that although the memorandum was itself uncertain, yet, as a part performance was made the basis of the claim to a specific execution of the agreement, parol evidence might be connected with the memorandum for the purpose of making out the contract; and there being satisfactory evidence of an agreement, independently of the memorandum, and the conduct of the respondent being a fraud on the appellants, a specific performance was decreed": *Parkhurst v. Van Cortland*, 14 Johns. 15; 7 Am. Dec. 427.

It is said that the fact that a promise has been made and never performed is not evidence of fraud, but the rule has its exceptions. Judge Cooley says: "If deceit, in order to be actionable, must relate to existing or past facts, it is evident that the fact that a promise made in the course of negotiations is never performed is not, of itself, either a fraud or the evidence of a fraud. Nevertheless, a promise is sometimes the very device resorted to for the purpose of accomplishing the fraud, and the most apt and effectual means to that end. Such is the case, already mentioned, of the purchase of goods with the intention not to pay for them. It is the fraudulent promise that accomplished the wrong. So if one promises to take up encumbrances on the title of another, and by means of the promise throws the promisee off his guard while he secures the title for himself, it would be a singular defense for him to make that he had only failed to perform his promise. The promise was merely his false token, by means of which he effected his cheat. So if the beneficiary in a will, when the maker thereof is on his death-bed, say to him he need not trouble himself, for he, the beneficiary, will make conveyance according to the wishes expressed, he may be held to this promise as a fraud, if he did not intend to perform it": Cooley on Torts, 487. The opinion in the case last cited quotes approvingly from an old but valuable work on frauds some descriptions of fraud which have always been recognized as correct, and never better stated by more recent authorities. The quotations are from Roberts on Frauds. "The relief," says he (p. 13), "against the statute [of frauds] in these cases of part performance was originally founded on the fraud and deceit usually characterizing the circumstances. There is no satisfactory foundation for the doctrine of part performance without the intermixture of fraud; [p. 132] and upon this ground, where an owner of lands has encouraged another to go on with his improvements upon the estate under a false expectation of a conveyance or a lease, and this expectation is raised in him by the assurance of such owner it is agreeable to the general course of equitable relief to disappoint the contrivance by compelling the deceiver to realize the expectation he has created,—that is, by compelling him to give such deed or lease. This protecting jurisdiction," he says, "has stretched itself to those cases where the illusory hope has been raised, not only by words and assurances, but simply by looking on in silence, whilst false impressions,

which we are able either to correct or verify, are inducing a fruitless expenditure on improvements. This equity is strong and salutary, and the jealousy of jurisdiction has shut out the statute of frauds, where this principle of relief applies." Again, he says (p. 134): "These instances of encouragement, either tacit or express, to make improvements and incur expenses, etc., are not proper cases of part performance, but of actual fraud, which courts of equity have always been forward to relieve against." The meaning seems clear that the fraud was not in making to appellants the promise to sell them the land or lease it to them, nor in the failure to perform simply. All this might have occurred without fraud if the parties could have been placed *in statu quo*. The fraud consisted in inducing appellants, by means of such promise, to go upon the land, and invest their labor and money there, and then robbing them of the resulting benefits by revoking their license to remain there in the homes they had built there lawfully, and which were their own. Even the law courts, in a number of cases, recognize the title of the occupants to the improvements in such cases, and their right to remove them, or to be paid for them.

We do not overlook the fact that a labored argument has been made in the case at bar against the doctrine that part performance of a parol contract for the sale of real estate takes it out of the operation of the statute of frauds. Especial force is laid upon the words of our statute declaring such contracts void. We had supposed this not to be an open question. We will not attempt to review the authorities upon the question. This has been done too often by our ablest jurists. But in recognition of the elaborate argument of counsel, we will give the conclusions arrived at by two of our American commentators, whose works are standard authorities in all our courts. We quote first from Story's Equity Jurisprudence:—

"Sec. 759. In the next place, courts of equity will enforce specific performance of a contract, where the parol agreement has been partly carried into execution."

"Sec. 761. But a more general ground, and that which ought to be the governing rule in cases of this sort, is, that nothing is to be considered a part performance which does not put the party in a situation which is a fraud upon him, unless the agreement is fully performed. Thus, for instance, if, upon a parol agreement, a man is admitted into possession,

he is made a trespasser, and is liable to answer as a trespasser if there be no agreement valid in law or equity. Now, for the purpose of defending himself against a charge as a trespasser and a suit to account for the profits in such a case, the evidence of a parol agreement would seem to be admissible for his protection; and if admissible for such a purpose, there seems to be no reason why it should not be admissible throughout. A case still more cogent might be put, where a vendee, upon a parol agreement for a sale of land, should proceed to build a house on the land, in the confidence of a due completion of the contract. In such case there would be a manifest fraud upon the party in permitting the vendor to escape from a due and strict fulfillment of such agreement. Such a case is certainly distinguishable from that of a part payment of the purchase-money, for the latter may be repaid, and the parties are then just where they were before, especially if the money is repaid with interest. A man who has parted with his money is not in the situation of a man against whom an action may be brought, and who may otherwise suffer an irreparable injury."

And from Pomeroy's Equity Jurisprudence:—

"Sec. 140. The doctrine was settled at an early day in England, and has been adopted in nearly all the American states, that a verbal contract for the sale and leasing of land, or for a settlement made in consideration of marriage, if part performed by the party seeking the remedy, may be specifically enforced by courts of equity, notwithstanding the statute of frauds. The ground upon which the remedy in such cases rests is that of equitable fraud. It would be a virtual fraud for the defendant, after permitting the acts of performance, to interpose the statute as a bar to the plaintiff's remedial right."

And in section 103 we find the following language: "Under the prohibition of the statute of frauds, a contract for the sale of land, when not in writing, cannot be enforced in law, even though part performed. It makes no difference whether the statute says, as in England and in some of the states, that no action can be maintained on such an agreement, or says that the agreement is void; the result is practically the same in either form of the statute: the verbal contract is no contract in law, but is simply a nullity. Equity speaks a very different language. It says that such a verbal contract, if part performed in a proper manner, shall be enforced."

It is sufficiently apparent, without rehearsing what has

gone before or citing additional authorities, that the ground upon which equity exempts a partly executed parol contract for the sale of realty from the operation of the statute of frauds, and decrees the execution of the contract, is simply fraud. It is said the object of the statute is to prevent fraud, and equity will not allow it to be made the instrument of fraud. When so understood and limited, the rule is a salutary one. Story says, in the case of a vendee of land by parol building a house upon it in faith of the completion of the contract, there would be manifest fraud in permitting the vendor to escape from a due and strict fulfillment of the agreement. Pomeroy says it would be a virtual fraud for the defendant, after permitting the acts of performance, to interpose the statute as a bar to the plaintiff's remedial rights. But suppose the owner of the land, without going so far as to make a complete contract, specific in all its material terms, so as to be capable of definite proof and of enforcement, should stop short of that, but should, by other inducements, influence persons to invest money and labor on his lands, with a positive assurance that their possession should not be interfered with, and that they should eventually receive titles covering their improvements, and that he should stand by and permit and continue to encourage these investments in execution of the permission he had given them to erect improvements and make their homes upon his land. If he should then revoke their license, bring ejectment to expel them from the homes they had built, and interpose the statute of frauds in bar of all relief to them, would his conduct be less a fraud in this case than in the other? The Pennsylvania courts say it would be the same, and that a mere license for the occupation or use of real estate will entitle the persons who have incurred considerable expense in execution of such license to relief in equity as fairly and fully as part performance of a parol contract for the sale of real estate entitles the vendees to such relief. The case of *Rerick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497, decided in 1826, citing and approving the prior case of *Le Fevre v. Le Fevre*, 4 Serg. & R. 241, 8 Am. Dec. 696, goes to the full extent of declaring such executed license an agreement on valuable consideration. It should be observed that Pennsylvania had no chancery courts, but administered equitable relief in the common-law actions, and through the common-law forms. *Rerick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497, was an action on the case for diverting water from a stream,

thereby injuring plaintiff's mill. The water had been taken from its natural channel, and turned into this stream leading to plaintiff's mill, by a structure erected on land of defendant under a license from him. He afterwards removed this structure, so as to allow the water to return to its old channel. Plaintiff had erected a mill on the faith of the authority to so divert and use this water, and the loss of it would render his mill unserviceable during a considerable portion of the year. Plaintiff contended that, under these circumstances, the license was irrevocable. Defendant contended that a mere license is revocable under all circumstances and at any time. The court says: "But a license may become an agreement on valuable consideration,—as where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it as soon as the benefit expected from the expenditure is beginning to be perceived. Why should not such an agreement be decreed *in specie*? That a party should be let off from his contract, on payment of a compensation in damages, is consistent with no system of morals but the common law, which was in this respect originally determined by political considerations, the policy of its military tenures requiring that the services to be rendered by the tenant to his feudal superior should not be prevented by want of personal independence. Hence the judgment of a court of law operates on the right of a party, and the decree of a court of equity on the person. But the reason of this distinction has long ceased, and equity will execute every agreement for the breach of which damages may be recovered, where an action for damages would be inadequate remedy. How very inadequate it would be in a case like this is perceived by considering that a license which has been followed by an expenditure of ten thousand dollars as a necessary qualification to the enjoyment of it may be revoked by an obstinate man who is not worth as many cents. But, besides the risk of insolvency, the law, in barely compensating the want of performance, subjects the injured party to risk from the ignorance or dishonesty of those who are to estimate the *quantum* of the compensation. In the case under consideration, no objection to a specific performance can be founded on the intrinsic nature of the agree-

ment, nor, having been partly executed, on the circumstance of its resting in parol; but it is to be considered as if there had been a formal conveyance of the right, and nothing remains but to determine its duration and extent. A right under a license, when not specifically restricted, is commensurate with the thing of which the license is an accessory. Permission to use water for a mill, or anything else that was viewed by the parties as a permanent erection, will be of unlimited duration, and survive the erection itself, if it should be destroyed or fall into a state of dilapidation; in which case the parties might perhaps be thought to be remitted to their former rights. But having had in view an unlimited enjoyment of the privilege, the grantee has purchased, by the expenditure of money, a right, indefinite in point of duration, which cannot be forfeited by nonuser, unless for a period sufficient to raise the presumption of a release. The right to rebuild, in case of destruction or dilapidation, and to continue the business on its original footing, may have been in view as necessary to his safety, and may have been an inducement to the particular investment in the first instance. The cost of rebuilding a furnace, for instance, would be trivial when weighed with the loss that would be caused by breaking up the business and turning the capital into other channels; and therefore a license to use water for a furnace would endure forever. But it is otherwise where the object to be accomplished is temporary. Such, usually, is the object to be accomplished by a saw-mill, the permanency of which is dependent on a variety of circumstances, such as an abundance of timber, on the failure of which the business necessarily is at an end. But till then it constitutes a right, for the violation of which redress might be had by action. With this qualification, it may safely be affirmed that expending money or labor in consequence of a license to divert a watercourse or use a water-power in a particular way has the effect of turning such license into an agreement that will be executed in equity." If this be correct, of course a license for any other purpose extending to the permanent use or occupation of realty, and upon which money had been expended, would have a similar effect, according to the nature and terms of the license.

We have quoted at considerable length from the above case, because it discusses and decides so many important points so briefly and so clearly, obviating the necessity of a restatement of the points decided or of the doctrine of the case. It is well

to observe, however, that the case is not a suit for specific performance, but an action on the case for damages. The license to divert the water on the land of defendant, and to maintain a structure there for the purpose, followed by large expenditure on the faith of such license, is declared to be an agreement on valuable consideration, and to be considered as if there had been a formal conveyance of the right, — i. e., a conveyance by deed. Underlying all is the idea of the important interests involved and depending upon the validity and irrevocability of the license. This is a leading case. It has been followed in Pennsylvania, and to a considerable extent in other states: See *Swartz v. Swartz*, 4 Pa. St. 353; 45 Am. Dec. 697; *Wheatley v. Chrisman*, 24 Pa. St. 298; 64 Am. Dec. 657; *Huff v. McCauley*, 53 Pa. St. 206; 91 Am. Dec. 203; *Dark v. Johnston*, 55 Pa. St. 164; 93 Am. Dec. 732; *Thompson v. McElarney*, 82 Pa. St. 174; *Cumberland Valley R. R. Co. v. McLanahan*, 59 Pa. St. 80. And this last case declares a subsequent ratification by parol equivalent to a precedent authority. The New York doctrine at law is sufficiently indicated in the case of *Mumford v. Whitney*, 15 Wend. 381; 30 Am. Dec. 60; and in equity, by *Parkhurst v. Van Cortland*, 14 Johns. 15, 7 Am. Dec. 427, already referred to. So in Vermont, by the cases of *Hall v. Chaffee*, 13 Vt. 157, and *Pope v. Henry*, 24 Vt. 560. It seems that Massachusetts has adhered to the doctrine of *Cook v. Stearns*, 11 Mass. 533. New Hampshire and Maine seemed inclined to the Pennsylvania view at first: See *Ameriscoggin Bridge v. Bragg*, 11 N. H. 102; *Woodbury v. Parshley*, 7 N. H. 237; 26 Am. Dec. 789; *Sheffield v. Collier*, 3 Ga. 82; *Ricker v. Kelly*, 1 Me. 117; 10 Am. Dec. 88; *Clement v. Durgin*, 5 Me. 9. But afterwards they both wavered, holding that while the license might be valid as between the original parties, it would not be as between their vendees or successors in interest: See *Carleton v. Redington*, 21 N. H. 291, and *Seidensparger v. Spear*, 17 Me. 123; 35 Am. Dec. 284.

In discussing the question of parol licenses, the supreme court of Ohio uses the following language, after referring to the differing decisions of neighboring states: "But in Ohio, we think it can, at this day, be hardly considered as an open question. Partly performed parol contracts, especially when the non-execution would operate as a fraud on the rights of the vendee, have repeatedly been enforced in equity, and a parol license executed has been held to be irrevocable in numerous instances, on the circuit, at law": *Wilson v. Chalfant*,

15 Ohio, 248; 45 Am. Dec. 574. See also *Hornback v. Cincinnati etc. R. R. Co.*, 20 Ohio St. 81. Indiana coincides substantially with Pennsylvania. Her supreme court says: "But though a parol license, amounting in terms to an easement, is revocable as to future enjoyment at law, and is determined by a conveyance of the estate upon which it was to be enjoyed, this is not the rule in all cases in courts of equity. In these courts, the future enjoyment of an executed parol license, granted upon a consideration, or upon the faith of which money has been expended, will be enforced, at all events, where adequate compensation in damages could not be obtained. This will be done on the two grounds of estoppel on account of fraud, and specific performance of a partly executed contract to prevent fraud. And in those states of the Union where law and equity are administered in the same court, relief is afforded in any given suit where the pleadings present the necessary averments; and grantees, as well as the original parties, are bound, where they purchase with notice; and in a mill and dam, the existing condition of things might be notice to them of the equity": *Snowden v. Wilas*, 19 Ind. 10; 81 Am. Dec. 370; cited and approved in *Lane v. Miller*, 27 Ind. 534, and *Simons v. Morehouse*, 88 Ind. 391. In Iowa, the doctrine is well established that an executed parol license for the occupation of real estate cannot be revoked either by the licensor or his grantee with notice, at least not without compensation: *Bush v. Sullivan*, 8 G. Greene, 344; 54 Am. Dec. 506; *Beatty v. Gregory*, 17 Iowa, 109; 85 Am. Dec. 546; *Anderson v. Simpson*, 21 Iowa, 399; *Harkness v. Burton*, 39 Iowa, 101; *Wickersham v. Orr*, 9 Iowa, 258; 74 Am. Dec. 348. In Illinois, the decisions are contradictory and unsatisfactory. In *Russell v. Hubbard*, 59 Ill. 335, it was held in the strongest terms that an executed license, where the parties could not be placed in *status quo*, was irrevocable; that the revocation in such a case would be a fraud, and compensation for damages no adequate redress. This case was decided in September, 1871. It was an action at law involving an executed parol license to use a party-wall. Three years after, in the case of *Kamphouse v. Gaffner*, 73 Ill. 461, the court held that this case must be considered as overruled or limited to cases of party-walls. The court says further: "On mature consideration, we are unwilling to announce the doctrine that, notwithstanding the prohibition of our statute of frauds to the contrary, an interest in land which cannot be terminated by

revocation may be acquired by parol license, which a court of law will recognize and protect. We still preserve the distinction between law and equity, however; and to what extent a court of equity might enforce specific performance, or grant relief on account of the peculiar hardship resulting from a revocation by a licensor, is another question, and one that we cannot now properly consider." The cases referred to as having been decided by the supreme court of Iowa in some respects are commendable "for the equitable view they take of the question; but when applied to a court in which the distinction between law and equity are preserved, they are contrary to the current of authority, and we do not feel at liberty to follow the rule they indicate." The case is an action at law, but reference is made, in the opinion, to the case of *Woodward v. Seely*, 11 Ill. 157, 50 Am. Dec. 445, a chancery case, which announces the same doctrine. The latter case, however, refers for authority to law cases exclusively. This patent absurdity destroys its weight as an authority in equity.

It is said that equity follows the law, which is true. But equity has a scope of its own for giving relief, especially against actual or constructive fraud, which the law cannot give; otherwise there would be no such thing as equity jurisdiction distinct from the law. When the law says that a parol contract for the sale of land conveys no estate under the statute of frauds, equity does not deny it; but when, by virtue of such contract, the vendee has been put in possession of the land, induced to make valuable improvements thereon, of which he would be defrauded and robbed by excluding him from the possession, and where a judgment of damages would not afford adequate relief, equity steps in, and says the vendor shall not accomplish this fraud by enforcing his legal title at law in ejectment, but that he shall make a deed of the land, conveying an estate in accordance with the terms of the parol contract. When the law says that a parol license cannot give the licensee a permanent interest, easement, or estate in land, equity will not deny it; but when, by virtue of such license, the licensee has been put in possession, and induced to put valuable improvements on the land, of which he would be defrauded and robbed by a revocation of the license and ejectment by the holder of the legal title, equity will interpose, and either forbid the licensor to revoke the license, or impose such terms as will avoid the fraud, and accomplish what justice and good conscience demand. The supreme court of

Wisconsin states the doctrine in this way: "Most of the American courts have been satisfied with determining that 'a party who has induced the incorporation of the property of another with his own, through the means of a promise not to interfere with its use or enjoyment by the latter, shall not be allowed to commit the fraud of appropriating it to his own purposes, although he may withdraw the right to use it in the manner originally contemplated, and compel the other party to resort for redress to an action.'" And again: "In cases, however, where money has been expended or improvements made and buildings erected on the faith of a parol license, which has been thus executed, courts of equity have generally interposed, at all events, so far as to restrain the licensor from appropriating to his own use and benefit the labor expended and improvements made on the faith of such license, without placing the licensee in the same situation in which he stood before he entered upon its execution": *Hazelton v. Putnam*, 3 Pinn. 107; 54 Am. Dec. 158. "There is no rule more necessary to enforce good faith than that which compels a person to abstain from enforcing claims which he has induced others to suppose he would not rely on. The rule does not rest upon the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced another to act in such a manner that he will be seriously prejudiced if he be allowed to fail in carrying out what he has encouraged them to expect": *Faxton v. Faxon*, 28 Mich. 159; *Harkness v. Toulmin*, 25 Mich. 80; *Truesdail v. Ward*, 24 Mich. 117. "If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain": *Leeds v. Amherst*, 2 Phill. Ch. 123; cited in *Faxton v. Faxon*, 28 Mich. 159. "The same ideas are enunciated in various forms by many authorities, both English and American; among others, see *Gregg v. Von Phul*, 1 Wall. 274; *Swan v. Seamens*, 9 Wall. 254; *Skinner v. Dayton*, 19 Johns. 513-561; 10 Am. Dec. 286; *Raw v. Pote*, 2 Vern. 239; *Thompson v. Blanchard*, 4 N. Y. 803; *Parrott v. Palmer*, 8 Mylne & K. 632"; cited in *Faxton v. Faxon*, 28 Mich. 159. In Rhode Island, it is held that an executed parol license will not be held irrevocable in a court of law, but that equity will give appropriate relief: *Foster v. Browning*, 4 R. I. 53; 67 Am. Dec. 505. Georgia holds that a parol license to enjoy an interest in lands is void at law, but where large investments

have been made on the faith of the license for the enjoyment of the interest, equity will decree specific performance of the terms of the license as in case of a parol contract for the sale of lands; and where a defendant might, by going into equity, defeat an action at law, he may set up his equitable defense at law: *Cook v. Pridgen*, 45 Ga. 331; 12 Am. Rep. 582. But we will not quote further from the cases upon this point. Enough has been given to show that they are not harmonious, but that the conflict is principally in the courts of law. Enough has been given to show, also, the trend of the different lines of judicial thought and decision upon the questions involved. How can we reconcile the cases? Can they be reconciled? If we adopt the rule that a parol license to permanently occupy, use, and enjoy realty, when executed in whole or in part at considerable expense, becomes irrevocable and transmissible, and say that this rule is supported by a large number of respectable authorities, we are at once met with the indisputable proposition that it is denied by a large number of respectable authorities. It seems that this conflict may result from drawing general rules from particular cases. Two cases may be in direct conflict upon the general proposition, and yet each be right as applied to its own particular facts. A parol license may be irrevocable in one case and revocable in another, according to the varying facts and circumstances of the two cases.

There is one proposition in regard to which there is no conflict. All authorities — case law and text-book law — agree that it is the proper province of equity to give relief in case of fraud, whether the fraud be actual or constructive, intentional or non-intentional. It would be rash to attempt to give a perfect definition of fraud. Many eminent jurists have attempted it. None have succeeded. The best definitions given admit of so many exceptions as to greatly impair their usefulness in judicial discussion. The only safe way seems to be to define, or rather describe, the fraud suspected to exist in any given case, by comparison with similar cases selected from the reports. Of all the attempted definitions to be found, it seems that none are more satisfactory or instructive than merely to say that fraud is unfair dealing; and when, through inducements held out by one person, even only by means of a promise, by which another person is influenced to change his position so that he cannot be placed *in statu quo*, and will be seriously damaged unless the promise is ful-

filled, then the refusal to perform is fraud. Any transaction that outrages our sense of justice or shocks the conscience of an honest man may well be viewed with suspicion, and scrutinized closely. It seems clear, in the case of *Parkhurst v. Van Cerkland*, 14 Johns. 15, 7 Am. Dec. 427, that the court was right in pronouncing the conduct of the defendant a fraud upon plaintiffs. Defendant had given permission to plaintiffs to go on his wild land,—to “possess” it,—and promised them that as soon as he could perfect his own title he would secure them in the permanent occupation of the land by a sale to them, or a permanent lease. He thus induced them to expend money and labor, and make homes there. He afterwards attempted to revoke their license, repudiated his promise, and brought ejectment against them on his legal title. Plaintiffs then brought their bill in chancery for an injunction, and for specific performance. The case is very similar to the case at bar. The court was right in exercising its equity powers, and taking jurisdiction on the ground of fraud. The defendant had simply enticed plaintiffs onto his ground, and entrapped them there with the tempting bait of a favorable location to build homes on easy terms, and was endeavoring to shear them like sheep, and drive them off with his writ of ejectment. It was unconscionable that his scheme should be allowed to succeed. It made it no better that he relied upon his legal title, and appealed to the rigid rules of the common law and her courts to aid him. To grant such aid would have been to outrage justice in her temple, through the instrumentality of her own chosen ministers. In fact, it was admitted on all hands that it was a proper subject for the interposition of equity. The only contention was, whether the relief should be compensation or specific performance. A majority of the court decided in favor of specific performance. *Russell v. Hubbard*, 59 Ill. 335, was a case of a party-wall. One Harman owned the wall, and it was built to the north line of his lot. One Furry was about to build a frame house on the adjoining lot. Harman induced him to build of brick, giving him the use of the north wall of his (Harman's) house as the south wall of his (Furry's) house, on condition that he would build a brick building. He did so. The court says: “By virtue of this agreement, and the erection of the building, equitable rights were acquired. Though the license to use the wall might be revoked prior to its execution, after execution a different question arises, and

the possession was constructive notice to the purchaser of the rights which had been acquired. Money had been expended upon the faith of the license, and a different and more expensive building erected. While, ordinarily, it may be true that a parol license of this character is not transmissible, may be revoked at pleasure, and extinguished by the alienation of the land, yet, where money or labor has been expended, the law will interpose to protect the licensee. The revocation, under such circumstances, would be fraudulent, and compensation in damages would afford no adequate redress. In such case the execution of the parol permission would supply the place of a writing, and take the case out of the statute of frauds. It would be the boldest fraud to allow this permission to be revoked. The grantee of Harman was chargeable with notice of Furry's equity at the time he took the mortgage, and he stands in the place of his grantor. The license has been acted upon, and the parties cannot be restored to their original position." This case was afterwards overruled, or restricted in its application to party-walls, on the ground that the remedy, if there be any, should be sought in equity, and not at law: *Kamphouse v. Gaffner*, 73 Ill. 461. But we believe the court was right in saying it would be a fraud to revoke the license, in reliance upon which a house had been built, and that, if not at law, at least in equity, there is a remedy for the licensee, or his vendee or successors in interest. Cases may arise and have arisen where a license to occupy land has been intended and understood as a mere personal favor to the licensee to give him a place to live, or to occupy for some other beneficial purpose not transmissible, but revocable at will. Then expenditures would naturally be made accordingly. In other cases the granting of the license has been in terms an assurance of permanent possession. It is evident that the same rule cannot apply to both classes of cases. The revocation of the license, even after expenditures made in consequence of it, in the one case is a right, in the other a fraud. No general rule can be made as to the revocability of such licenses after such expenditures. Each case stands upon its own circumstances. The conflict in the authorities has arisen largely from an attempt to make a general rule that all such licenses are revocable on the one hand, or that they are not revocable on the other, when, if the courts had simply decided the cases, and left out the general rule, they might all have been right, and not in conflict. When we have traveled

through the mass of decisions, cloudy and conflicting at times, and have arrived at the principle that equity will relieve where there is fraud, actual or constructive, we have arrived at a principle in regard to which there is no conflict. And courts of equity, as quotations already given show, are very generally agreed that the revocation of a parol license to permanently occupy and improve realty after any considerable expense has been incurred on the faith of such license, under circumstances such that the parties cannot be placed *in statu quo*, is either actual or constructive fraud. Even the courts of law very extensively recognize the fraud, and some of them remedy it by equitable estoppel; but it seems the majority of them acknowledge their inability to furnish the appropriate remedy, while suggesting frequently that equity may do so.

Verling K. Hart perpetrated no fraud. He treated the settlers on his land by his permission as rightfully there. Juliet W. Hart committed no fraud. She also treated the settlers on the town site of Buffalo as rightfully there, even to the extent of extending their license to occupy, improve, and hold lots, which expired with Verling K. Hart on February 17, 1883, to the 23d of the following August. A license to hold and enjoy realty may be made as effectual by subsequent ratification as by precedent authority. Her conduct was such as to recognize and acknowledge the rights of the settlers under the license given them by Verling K. Hart, at least, to the extent that they were not trespassers, and that their improvements were their own. This was a substantial ratification of their license. Her present attitude of seeking to evade or annul this license, as to complainant, is not voluntarily assumed. It is, in a measure, forced on her by the complainant's own acts. His conduct is not such as to commend him to the favorable consideration of a court of equity. It cannot be supposed that Verling K. Hart, in assuring the settlers that they should have the land improved by them, could mean more, in regard to lots on a business street, than one lot to a building, included within the limits of the lot, or sufficient front to clear their buildings, where more than one lot was built on, and the depth of the lots back. This is a fair understanding of the terms in which he gave permission to occupy and improve lots. If the terms in this respect, and one or two others, had been more definite, the parol license to occupy would have been converted into a parol contract of sale. All of this was offered complainant for a small price;

but, while not objecting to the price, he wanted more ground. We cannot sustain complainant's claim to the ground, or any portion of it, the contract under which he claims being incomplete in the one case, and impossible of performance in the other. And yet to deprive him of his improvements, made, as they evidently were, in good faith, is no less than a fraud upon him.

The proper measure of relief in such cases is a matter in which there is much diversity of opinion. The Pennsylvania courts go to the extent of holding a parol license, executed in whole or in part, at large expense, an agreement on valuable consideration, and hold it irrevocable, and enforce it according to its scope, meaning, and intent. On the other extreme, a few cases can be found refusing any relief whatever. In this regard, as in others, each case must stand upon its own facts and circumstances. Equity has ample power to mold a decree that will accomplish substantial justice. To determine what substantial justice requires, we must take into consideration all the facts and circumstances of this particular case. Cases almost without limit can be found announcing, in general terms, rules apparently applicable, but when the facts of such cases are examined, few can be found that are parallel to the case at bar. As already explained, the terms of the license in this instance were too incomplete in several particulars to constitute a contract capable of specific performance in equity. But the terms and the true intent of that license, so far as they can be ascertained, are controlling considerations in determining the equities of the parties. The license by Verling K. Hart was given before any survey or platting of the town, — before the location, size, and shape of blocks and lots had been determined. We have already intimated the view that all that settlers are equitably entitled to under that license on business streets is sufficient front to clear their buildings, and the depth of a lot back. This is a liberal construction in favor of the settlers. Fischer's understanding of Hart's inducement to settlers, and which he was authorized to make public as far as the railroad, was, that mechanics and good people locating and making improvements on the town site should have each a lot at small expense, — as he understood it, the expense of recording. The size of town lots had not then been determined. A fair construction of this is, that it means, as applied to business streets, the front and depth back already indicated. This is defendant's con-

struction. The written instrument of September 20, 1888, would indicate such intent; but that, being a proposition to settle all controversies, is not conclusive. When complainant was building on lot No. 2, as Wood thinks, but at work on lot No. 1, as he thinks himself, and when Wood was making a preliminary survey for defendant, Wood and complainant had a conversation in regard to the matter. Complainant says that Wood was defendant's agent. Wood says he was not, but states that he platted the town site, and had been assisting Mrs. Hart, defendant, in making sales, and in advertising her business generally. He is her brother-in-law. It would seem from all the evidence that the building which Wood speaks of as about lot 2 actually extends over on lot 3. Wood's recollection of this conversation, and complainant's, do not agree. It is not very material what the conversation was. It is material, however, that then, or soon after, the erection of the building mentioned was going on, and neither then nor afterwards was it objected to by defendant herself, or by Wood for her, although they both lived within three hundred or four hundred feet of the place, and defendant, as well as Wood, must have known of the erection of the building. It is also questionable whether, under the circumstances, plaintiff had not a right to rely on Wood's admitted statement to him that Mrs. Hart would not probably interfere with his building unless in the way of platting the town, and to expect that, if she did object, Wood would ascertain the fact, and inform him of it. This much would seem to come within the scope of Wood's employment, as stated by himself. No intimation ever reached complainant to the effect that it was desired he should not proceed. The circumstances would rather seem to corroborate complainant's understanding that defendant would be glad to have such a building erected. He says at the time of its erection it was the best building in town. At any rate, he was not treated as a squatter or a trespasser. But this gave him no right to claim more land than necessary for the reasonable use and enjoyment of the buildings he had erected or was then erecting. This amount of land the language and conduct of Verling K. Hart in his lifetime shows that he intended settlers putting up fairly good buildings should have. This amount the language and conduct of defendant shows that she intended settlers to have, who erected or commenced such buildings on or before August 23, 1883. The main consideration of this inducement was, doubtless, the location and

holding there of the principal town of that portion of the country; and this was a very important and valuable consideration. It probably made a few acres more valuable than the entire desert claim would have been without the town upon it. In addition to this, the settlers were to pay what sometimes was called a nominal price, sometimes a small price, probably intended to cover expense of surveying, platting, recording, conveyancing, etc.

When this cause was tried below, no question of rents and profits was in issue. At the time the evidence was taken, the cause argued and submitted, and the opinion of the chancellor filed, indicating what the decree would be, there was positively nothing in the pleadings as to any rental values. The answer concluded with a general charge that complainant had derived great benefit and emolument from the use of said premises, etc., — a statement too indefinite for a ground of judgment, and on which no judgment was asked. The cross-bill attempted to raise the question. It is proper, and probably necessary, that we now give our views upon that question for the guidance of the court below, as it is likely to be considered in the future progress of the case, and is included in the decree. This seems to be simply and clearly a case where the property of complainant has been incorporated with that of defendant with the consent and permission of defendant and her predecessor in interest, and that the property on both sides was real estate, and that of complainant such as usually becomes part of the inheritance; that this was done under a parol license, now executed at large expense by complainant, which license was in the nature of an agreement for the future sale and conveyance to complainant of the land of defendant upon which complainant's part of the property, consisting of valuable buildings, was placed and erected; that this license, although in the nature of such agreement, and now executed on the part of complainant, is incomplete in some of the material terms necessary to constitute a contract, and cannot be specifically enforced as such; that it was not contemplated, either by licensee or licensors, that any rent, either ground-rent or other rent, should ever be charged against the licensee, but rather that he was considered the equitable owner of the land upon which he erected his buildings, and entitled to the legal title as soon as practicable, at a small charge, probably intended merely to cover incidental expenses. Under these circumstances, while

we cannot give complainant the legal title to the land, we do not think it equitable that he should pay rent for it.

The case of *King's Heirs v. Thompson*, 9 Pet. 204, decided by the supreme court of the United States in 1835, seems to have stood unchallenged as authority up to the present time. It was not exactly similar in all its facts to the case at bar, but seems precisely analogous in most of the legal and equitable principles involved. The case will be found to be in harmony with a number of those already cited, and, it is believed, in conflict with very few anywhere. It was a bill in chancery, praying for a decree for the legal title of the realty involved, or if that could not be decreed, that the property might stand charged with the amount of repairs and improvements expended on it. The complainants, Josiah Thompson and Elizabeth, his wife, were married in 1812. A few days after the marriage, George King, Elizabeth Thompson's father, being then in good circumstances, proposed to Josiah Thompson to give him a house and lot, then much out of repair, if he would repair it so as to make it a comfortable residence, stating at the same time that he intended the property for his daughter, complainant's wife. Complainant accepted the property, and expended upon it over four thousand dollars. On April 17, 1816, King wrote to complainant, that in order to remove any suspense in regard to the property on which complainant then lived, he held himself bound to give a deed to a trustee, who shall hold it in trust for the complainant and wife during their lives, etc. Complainant answered, April 28th, declining the proposition, and suggested, — 1. That the property be valued at the time he received it, and he would pay the amount over to King, etc.; 2. That the improvements be estimated, and King, on paying the amount, should receive a relinquishment of all his right; 3. That a deed of the property should be executed to complainant's wife. April 29th, King replied: "I make no hesitation in complying with your first proposal, for it is just what I first proposed to you; and I will do it another way, giving you your choice, viz., I will deed the dwelling-house and all above it to you, and about twenty feet below it; and then all below I will deed to Betsy [complainant's wife], provided that she will never deed it or dispose of it, except by will, which she shall always be at liberty to make when and how she pleases." Afterwards there was some correspondence in regard to rents of the premises after Thompson left them, King acting as his agent in

renting and in collecting and forwarding rents to complainant. There was no conveyance made, and in 1820 King died, insolvent. The litigation is between his heirs and creditors on one side, and Thompson on the other. The court holds that it is impossible to decree a title as prayed for in the bill, because the "evidence fails to establish the specific terms of the contract; but holds further, that whatever uncertainty may exist as to the terms of the contract, there can be no question that the complainant acted under it in taking possession of the property and expending a large sum of money in its improvement." And the opinion proceeds: "As the circuit court decreed a conveyance of this property to the complainant, that decree must be reversed, and the cause remanded to that court, with instructions to cause the property to be sold, after due notice, on such terms as they shall deem most advantageous to the estate of George King, and the proceeds of the sale first to be applied to the payment of the money expended by the complainant in making improvements on the property, and the balance, if any, to be paid over to the benefit of the creditors of the estate of King." No charge was made against complainant for rents received, or for the use of the property while he occupied it, nor allowance made for interest on money expended. The litigation being between the creditors of King, as well as the heirs, on one side, and the party who had made the expenditures on the property on the other, makes a stronger case for the recoupment of rents collected, and for a rent-charge for the use of the property while Thompson occupied it, than if, as in the case at bar, the litigation were between the original parties or their successors. The true doctrine of such cases is, that the party making the improvement cannot be made liable to a rent-charge by any notice to quit. He is in possession of his own property, incorporated, it is true, with the property of another, but without fault on his part; and his interests cannot be terminated in that way, either by commencement of suit or anything else that the licensor alone can do. This would be to make the executed license revocable at the will of the licensor, contrary to the prevailing doctrine in equity. The duty of the licensee to surrender possession, or to pay rent, which is equivalent, begins when he is paid for his interest, and not before; and this result can be reached only by a mutual agreement of the parties, or by a decree of court, and the sole justification for a court of equity in making such a decree exists

in the necessity of the case. In no other way can a separation of the interests of the parties be effected without serious injury to at least one of the parties. To remove improvements consisting of permanent and valuable buildings is, in great measure, to destroy their value. In the case at bar, such removal was forbidden by the defendant. The case of *King's Heirs v. Thompson*, 9 Pet. 204, like the case at bar, lies near the line which separates a license to occupy from a contract of sale. The case of *Parkhurst v. Van Cortlandt*, 14 Johns. 15, 7 Am. Dec. 427, lies near the line upon the other — the contract — side. The conveyance promised in the latter case was in the alternative, — a deed of title or a permanent lease, at the option of the licensees. The consideration was not fixed, but the contract or license provided the means of fixing it. It was to be the price of wild lands at the time of the conveyance. If a lease was chosen, the rent was to be the usual rental of similar lands in the vicinity. It may well be doubted if all chancellors would decree specific execution of a contract in these terms. The court was unanimous that the complainants were entitled to equitable relief, but divided on the question whether the relief should be compensation for improvements made or specific performance of the contract. A majority were in favor of specific performance.

The decree of the court below is inconsistent in its findings and conclusions. It declares that complainant, since June 28, 1884, has been, and is now, without right, tortiously, and unlawfully in possession of the property in controversy; but it gives judgment for rents only from September 5, 1885. This is the date of a notice to quit, which was served on him on September 7, 1885. If his possession was tortious, no such notice was necessary to fix his liability for rents. If such notice were necessary, rent should be computed from date of service. There is error in the decree in the following particulars: 1. In embodying in the decree an order in the nature of an interlocutory order allowing a cross-bill tendering new issues to be filed after the cause had been tried and the substance of the decree determined. 2. In decreeing relief to defendant upon the new matter set up in her cross-bill, in the same decree in which was contained the order allowing the cross-bill to be filed; thus giving complainant no opportunity to answer such cross-bill, or even to say whether he wished to answer it or not. 3. In attempting to adjudicate matters not in issue in the cause; that is to say, in awarding to defendant

the possession of the property in controversy, and process to put her in possession, and judgment in her favor for rents. 4. In denying to complainant compensation for improvements put by him upon the land in controversy. 5. In charging complainant rent for the property in controversy, which is error, even if rent were in issue. 6. In dismissing complainant's original and amended bills. 7. In refusing to enjoin defendant's two actions of ejectment. For these errors the decree of the district court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

This cause should be retried upon the theory that both complainant and defendant have a valid interest in the realty in controversy, and that complainant's possession of that portion of the ground occupied by his improvements is and has been rightful, and that he is liable for no rent for the same; but that the ground itself belongs to defendant. The value of the property, including the ground so occupied by complainant's improvements, and the improvements, should be ascertained, and the value of the ground and the improvements separately, and a decree should be made allowing complainant the present value of his improvements, and making it a lien upon the property. Then, unless defendant elect to discharge the lien by paying the amount into court for the use of complainant, the property should be sold as on execution, and the proceeds divided between complainant and defendant in the proportion of the value of their respective interests. Defendant having tendered to complainant, before the commencement of the litigation of the interests in controversy, all that he was equitably entitled to, and he having refused the tender, and his conduct in other respects having been arbitrary and reckless of the rights of others, he should pay all costs of this suit and of the two actions of ejectment mentioned in the pleadings herein; and the amount should be made a lien on his interest in the realty involved, and on the money paid into court to his use in lieu thereof, if such payment should be made; and an order of injunction should issue, enjoining defendant's prosecution of her said two actions of ejectment until complainant receives compensation for his improvements, or until the money be paid into court.

GROESBECK, C. J. (dissenting). While I concur with the majority of the court as to the equities of the case at bar, I dissent from that part of the opinion and judgment which

settles the relief to be given to the complainant. The elaborate and learned opinion of my brother Conaway establishes, to my mind, that the doctrines of license and equitable estoppel must be applied to the determination of this case, and that the complainant is entitled to relief under these well-known equitable doctrines. The rule is clear, that if the owner of an estate stands by and suffers another, who supposes himself to be entitled to certain lands, to go thereon, and make improvements and expend money there, — particularly if this is done by the invitation of the owner, under promise of title, — a court of equity will compel such owner, when he afterwards seeks to assert his title, to indemnify the one who made the expenditure, by making pecuniary compensation; and in such case, if the owner resorts to a court of law, and brings an action of ejectment, a court of equity, at the suit of the party making the expenditure, will work out the equitable principle by restraining the ejectment suit until compensation is made: 1 Pomeroy's Eq. Jur., sec. 390, and the cases there cited. By a general and public invitation on the part of Colonel Hart, extended to those of his class, the complainant occupied the parcels of land, and erected and maintained valuable improvements thereon. By these acts and those of others, contemporary with him, a town was started, and the desert-land claim of Colonel Hart became largely enhanced in value. This occupancy and improvement of the complainant was acquiesced in by Colonel Hart, his agent, and his successors in title, until September 7, 1885, when formal demand was made by Mrs. Hart upon complainant for the possession of the premises. Prior to that time she had tendered to the complainant a deed to all the parcels of land, in amount eighty-seven feet, upon which he had made lasting and permanent improvements, and this offer was of the same tenor as that made and accepted by others in the same situation as complainant. The price fixed was only forty-two dollars, and the rate fixed for each lot and portion of a lot actually improved by complainant was the same as that given to the other settlers and occupants under Colonel Hart's invitation. It was all that complainant had a right to expect, even under his construction of the general understanding of the early inhabitants and occupants of the town of Buffalo; yet this offer was refused, and the complainant demanded more land. If specific performance had been decreed to him, it is clear from

the testimony that complainant would have only obtained the lots and parcels of lots covered by the deeds. Mrs. Hart has therefore acted in good faith, and the evidence discloses that she honestly endeavored to respect every obligation and to redeem every promise made by her deceased husband, although she claimed that such obligation on her part was a moral, rather than a legal, obligation. The complainant does not object as to the price fixed in the deed for the land thereby granted. He is in the position of having forced the defendant into this protracted and expensive litigation. Nay, more, he has boldly attacked the title of his licensor, and that of the successors to the title, by attempting, with others, to have the patent withheld or canceled; thus compelling the outlay of a considerable sum, expended to meet his charges. By assailing the title he has evidently sought to coerce a settlement from the widow and administratrix in his own way and upon his own terms. While this conduct of the complainant may not operate to defeat his right to relief, it does not address itself favorably to a court of conscience. I concur with the majority of the court that he should be mulcted with the costs. Following the reasoning as set forth so ably in the majority opinion, complainant never had any title to the parcels of land claimed by him, and occupied and improved by him, and it cannot be granted to him. His right, then, is solely to be reimbursed for his outlay, to be paid for his improvements. His right to the use and possession of the premises ceased when demand was made upon him for their surrender, and he should not have a farthing for the use and occupation of them since that date. The value of the improvements should be ascertained as at the date of this demand, and interest should be computed thereon to the time of making the computation under the order of the district court. From this amount should be deducted the rents, issues, and profits of the premises since the date of demand, with interest thereon from the time the same were severally paid. The residue should be decreed to be a lien upon the premises, after a reasonable time is given to the defendant to pay the same; and the premises should be sold to satisfy this lien, under the direction of the district court. At the time of the taking of the testimony the rents had amounted to more than the value of the improvements, and since that time nearly four years have elapsed. I do not think that this con-

siderable sum should go to the complainant, and that he should be paid the present value of the premises. The computation I have suggested seems to me to be more equitable and just than the one adopted in the majority opinion, and for these reasons I dissent from the judgment and the opinion rendered in this case.

EQUITY — RELIEF GRANTED RESTRICTED TO ISSUE IN PLEADINGS. — Courts of equity will never go beyond the allegations in the bill in decreeing relief: *Ringgold v. Ringgold*, 1 Har. & G. 11; 18 Am. Dec. 250. A decree is inoperative and void, so far as it attempts to adjudicate matters not within the scope of the pleadings: *Sanders v. Logue*, 88 Tenn. 355. A complainant in equity must recover, if at all, on the grounds stated in his bill: *Purdy v. Hall*, 134 Ill. 298; *Merrill v. Washburn*, 83 Me. 189. A plea in chancery should clearly and distinctly aver all facts necessary to render it a complete equitable defense to the case so far as the plea extends: *Cheney v. Patton*, 134 Ill. 422. In a chancery suit, proofs without corresponding allegations in the bill are just as unavailing as allegations without proof: *Bremer v. Calumet etc. Dock Co.*, 123 Ill. 104. A complainant praying for general relief is entitled to any relief within the scope of the bill and proper under the evidence, although less than that prayed for: *Wise v. Hyatt*, 68 Miss. 714; *Lancaster Mills v. Merchants' Cotton-press Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586. In a suit in equity, the relief demanded does not limit the complainant in respect to his remedy. The court will disregard his prayer, and rely upon the facts alleged and proved in granting relief: *Nevin v. Lulu etc. Mining Co.*, 10 Col. 357; *Straus v. Babb*, 30 S. C. 342; 14 Am. St. Rep. 905.

SPECIFIC PERFORMANCE — CERTAINTY OF CONTRACT NECESSARY. — Specific performance of a parol contract for the sale of land will not be enforced, unless a contract clear, definite, and certain in its terms is admitted by the answer or satisfactorily established by the evidence: *Poland v. O'Connor*, 1 Neb. 50; 93 Am. Dec. 327; *Green v. Begole*, 70 Mich. 602. A parol agreement in part performed or executed will not be specifically enforced, unless the contract be established by competent proofs to be clear, definite, and certain in all its terms: *Hawelton v. Putnam*, 3 Pinn. 107; 3 Chand. 117; 54 Am. Dec. 158; *Rutan v. Crawford*, 45 N. J. Eq. 99; *Brundige v. Blair*, 43 Kan. 365; *Robbins v. McKnight*, 5 N. J. Eq. 642; 45 Am. Dec. 406, and note. In *Ross v. Allen*, 45 Kan. 231, it was held that where the memorandum of the contract was vague, indefinite, and uncertain, it was insufficient to satisfy the statute of frauds, and the contract could not be specifically enforced. As to the certainty in a contract requisite for specific performance, see monographic note to *Atwood v. Cobb*, 26 Am. Dec. 661.

LICENSE — PAROL — WHEN REVOCABLE. — An oral license to do any act on the land of another gives the licensee no interest in the land, and is revocable, not only at the will of the licensor by his death, but also by an alienation of the land: *Hodgkins v. Farrington*, 150 Mass. 19; 15 Am. St. Rep. 163, and note with cases collected; *Richmond etc. R. R. Co. v. Durham etc. Ry Co.*, 104 N. C. 658. See *Orovalde v. Lanigan*, 129 N. Y. 604; 26 Am. St. Rep. 551, and note.

LICENSE — WHEN BECOMES IRREVOCABLE. — A license to construct and maintain a ditch becomes irrevocable when the licensee makes improvements

or invests capital in consequence of it: *Flickinger v. Shaw*, 87 Cal. 126; 22 Am. St. Rep. 235, and note; *Baldock v. Atwood*, 21 Or. 72.

LICENSES — PROTECTION IN EQUITY. — Courts of equity will not allow a license to be revoked when it was given to influence the conduct of another, and has caused him to make large investments: *Curtis v. La Grande etc. Water Co.*, 20 Or. 34; *Thomas v. Junction City Irr. Co.*, 80 Tex. 550.

FOR A DISCUSSION OF THE REVOCABILITY OF PAROL LICENSES, see *Lawrence v. Springer*, 49 N. J. Eq. 269; post, p. 600, and extended note.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

CORCORAN v. CITY OF BENICIA.

[28 CALIFORNIA, 1.]

MUNICIPAL CORPORATION IS NOT LIABLE FOR SO GRADING a street as to prevent the flow of surface water from an adjacent lot.

John A. McKenna, for the appellant.

Matt Clarken, L. B. Misner, and John Lynch, for the respondent.

FOOTE, C. This an action to abate a nuisance, and for damages. A demurrer was filed to the complaint, one of the grounds of which is, that it did not contain facts sufficient to show a cause of action. The demurrer was sustained, and the plaintiff declining to amend the complaint, judgment was given and made for the defendant, from which this appeal is taken.

It is plain that the alleged nuisance in this case arose from the prevention of the flow of surface water from the defendant's lot down to a swamp adjacent to the Straits of Carquinez, by the raising of the grade of a street of defendant, a municipal corporation. This improvement of the street was made in accordance with lawful authority, unless it be held that the backing up on plaintiff's lot of this surface water, by raising of the grade of the street, made the city liable in damages for the creation of a nuisance in the shape of pools of water, which, it is alleged, were thus created on plaintiff's land. It has been held in this state, in *Conniff v. San Francisco*, 67 Cal. 45, that embanking and damming the natural channel for the escape of water so as to force it back upon a private owner's lot would render the city liable, but it was also conceded by the

decision in that case, at page 48, that such a corporation would not be responsible for damages caused by the gathering of "the surface waters not running in a natural channel produced by the raising of a street to the grade established by law." So the law is held to be in 2 Dillon on Municipal Corporations, sec. 1039; *Waters v. Village of Bay View*, 61 Wis. 644; *Henderson v. City of Minneapolis*, 32 Minn. 319; *Stewart v. City of Clinton*, 79 Mo. 612; *Clark v. City of Wilmington*, 5 Harr. (Del.) 244. In which last case it is said: "The collection of water on lots which are below the grades of new streets is inevitable, and, excepting the case of a running stream, the city would have no power, and it is not legally bound, to draw off the water. . . . The nuisance is not in the street, but on the lot, and the remedy is by raising the lot to a level with the street, which the city is not bound to do."

From this view of the matter, it is clear that the demurrer was properly sustained, and that the judgment ought to be affirmed, and we so advise.

TEMPLE, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

PATERSON, J., GAROUTTE, J., HARRISON, J.

Hearing in Bank denied.

MUNICIPAL LIABILITY FOR GRADING STREETS is discussed in the notes to *Goddard v. Harpswell*, 30 Am. St. Rep. 376; *O'Brien v. Philadelphia*, 30 Am. St. Rep. 835.

WILLIAMS v. FRESNO CANAL AND IRRIGATION Co.

[96 CALIFORNIA, 14.]

CONTRACTOR AND EMPLOYER. — IF THE CARRYING OUT OF A CONTRACT IS NECESSARILY INJURIOUS to a third person, the doctrine of *respondent superior* applies.

CONTRACTOR AND EMPLOYER. — FOR AN ACT OF A CONTRACTOR IN FLOWING UP THE LAND OF A THIRD PERSON, and using part thereof in constructing or repairing a canal, his employer is answerable, if it appears that it was part of the contract that the work should involve the using of such land.

PRINCIPAL AND AGENT. — EMPLOYMENT IN WRITING is not necessary to authorize an agent to act for a corporation in raising or otherwise improving a canal, and it may therefore be held answerable for his wrongful act in causing the land of a private proprietor to be plowed up, and part of the surface thereof used in improving the canal.

Church and Corey, for the appellants.

Saile and Corey, for the respondents.

McFARLAND, J. This action was brought to recover damages for wrongfully digging, plowing, and scraping away the soil of plaintiffs' land, and for an injunction against continuing the said alleged trespasses. The jury returned a verdict for plaintiffs in the sum of \$750, for which judgment was entered. Defendant appeals from an order denying a motion for a new trial.

1. The main point urged by appellant is, that the trial court erred in denying a motion for a nonsuit, made upon the ground "that no evidence has been adduced connecting the Fresno Canal and Irrigation Company with the alleged trespass set out in the complaint."

The appellant, a corporation, owned a canal running along the northern side of respondents' land; and for the purpose of raising and otherwise improving the canal, the top soil of respondents' land was plowed up to an average depth of about one foot, and over a space about sixty feet wide and a quarter of a mile long, and scraped off and piled up on the bank of said canal. The work by which this was accomplished was actually done by one Applegarth, and appellant contends that it was not responsible for the result of such work. But it sufficiently appears from the evidence that one Manuel was the surveyor of the appellant, regularly employed at a monthly salary, and that it was his business to have the work done on the canal; that he made some kind of contract (the particulars of which do not appear) with said Applegarth to do said work, and that by said contract said Applegarth was to take the soil from respondents' land. When A makes an independent contract with B, by which the latter is to do for the former a piece of work in itself harmless, and B does the work so carelessly or unskillfully as to injure a third party, A, as a general rule, is not liable. But when the contract is in its very nature and necessarily injurious to a third party, then the doctrine of *respondet superior* applies. In such a case the injury does not result from the manner in which the work is done, but from the fact that it is done at all. In *Boswell v. Laird*, 8 Cal. 489, 68 Am. Dec. 345, frequently cited as a strong case against the liability of principals, the court, by Judge Field, says: "If the mode and manner which constituted the defect by which the injuries complained of were occasioned

had been inherent in the plan, and this plan had been devised by Laird and Chambers, which the contractors were engaged to carry out, then liability would attach to Laird and Chambers." In the case at bar, the carrying away of respondents' soil was the very thing contracted for; and it inherently and necessarily caused the injury complained of.

Without reviewing the evidence here at length, it is sufficient to say that, in our opinion, the agency of Manuel to act for the appellant in the matter of repairing and enlarging the canal clearly appears. It was not necessary that his employment for that purpose should have been in writing.

2. The second point made by appellant is, that the verdict is not sustained by the evidence. This, however, is substantially the same as the one made about the nonsuit, and is not tenable.

3. The third and last point made by appellant is, that the court erred in allowing respondent to ask the witness Shipp the following question: "Would you give as much for that eighty acres of land since the digging and scraping as you would have given for that eighty acres of land before?" Assuming that this question was not in proper form, still it is impossible to see how it could have prejudiced appellant. Before the question was asked, the witness had testified at considerable length to the effect that he was a land-owner, and well acquainted with the nature of the soil and the value of land where the premises described in the complaint were situated, and that the digging and scraping had taken away from the value of the land. He was afterwards examined minutely, and testified that the land was worth \$250 per acre before the scraping; and he said: "I think this digging and scraping has damaged that part dug and scraped to the extent of its whole value," and that the acres thus injured "would not be worth anything now." In the face of this testimony, it was of no importance whether or not he said he would not give as much for the land after the scraping as before; of course he would not.

The order appealed from is affirmed.

CONTRACTOR, LIABILITY OF EMPLOYER FOR ACTS OF.— One who employs a fit and proper person as an independent contractor to do work not in itself unlawful, or a nuisance, or necessarily attended with danger to others, is not responsible for the contractor's negligence: *Lancaster Ave. Imp. Co. v. Rhoads*, 116 Pa. St. 377; 2 Am. St. Rep. 603. But employers are liable for injuries during the progress of work, caused by defective construction, which is inher-

ent in the original plan devised by the employers: *Boswell v. Laird*, 8 Cal. 409; 68 Am. Dec. 345; and if a proprietor undertakes to do that upon his lot which is dangerous in its nature to adjacent proprietors, he must use reasonable care to prevent injury to them, whether he does the work himself or through an independent contractor: *Dillon v. Hunt*, 105 Mo. 154; 24 Am. St. Rep. 374.

CORPORATIONS — LIABILITY FOR ACTS OF AGENTS AND OFFICERS. — Trespass may be committed by a corporation, if, by its managers or authorized agents, it commands the trespass, or sanctions it when committed: *Underwood v. Newport Lyceum*, 5 R. Mon. 129; 41 Am. Dec. 260; *Hopkins v. Atlantic etc. R. R.*, 36 N. H. 9; 72 Am. Dec. 287; *Brooks v. New Jersey R. R. etc. Co.*, 22 N. J. L. 323; 90 Am. Dec. 659; *Atlantic etc. R'y Co. v. Dunn*, 19 Ohio St. 162; 2 Am. Rep. 332.

MAHONEY v. BOSTWICK.

[35 CALIFORNIA, 82.]

DEED CLAIMED TO BE A MORTGAGE. — THE PRESUMPTION OF LAW IS, that an instrument is what on its face it purports to be; and this presumption, when a conveyance is claimed to have been intended as a mortgage, should be allowed to prevail, unless the evidence to the contrary is plain and convincing; but whether the evidence is of such character and strength as to produce this conviction, is a question for the trial court to determine.

DEED SHOULD NOT BE DECLARED A MORTGAGE, UNLESS the evidence leaves in the mind of the trial judge a clear and satisfactory conviction that the instrument, which in form is a conveyance, was by all the parties thereto intended as a mortgage.

MORTGAGEE WHO ENTERS INTO POSSESSION WITHOUT THE CONSENT OF THE MORTGAGOR, and wrongfully ousts him therefrom, is liable to be charged with the rents and profits, the same as any other dispossessor, and is not entitled to any accounting to determine how much he may have actually realized from his wrongful occupation, after deducting the necessary expenses of carrying on the farm.

MORTGAGEE WRONGFULLY TAKING POSSESSION IS NOT TO BE CREDITED with the value of fencing, ditching, and other improvements placed on the premises while he was holding them adversely to the mortgagor. Nor can the mortgagee recover for such improvements by proof that the mortgagor himself intended to make and would have made them, had he not been dispossessed of his land.

MORTGAGEE CANNOT REQUIRE, AS A CONDITION OF REDEMPTION, the payment of any other debt not a lien upon the land.

MORTGAGE — REDEMPTION. — THE PAYMENT OF A DEBT NOT SECURED by a mortgage cannot be exacted as a condition of redemption therefrom. The maxim that a complainant seeking equity should be compelled to do equity applies only when the relief sought by him and the right demanded by the defendant belong to or grow out of the same transaction.

W. L. Dudley, Baldwin and Campbell, and L. J. Maddux, for the appellant.

Stonesifer and Miner, and W. E. Turner, for the respondent.

DE HAVEN, J. The complaint in this action alleges, among other matters, that in August, 1884, plaintiff was the owner of the land therein described, and at that date he executed to one William Inglis a deed thereof, as security for money then advanced by said Inglis to pay off a debt due from plaintiff to the Stockton Savings and Loan Society, and which indebtedness was a lien on said land; that upon February 5, 1885, the defendant, by agreement with plaintiff, paid to said Inglis the amount then due from plaintiff to Inglis, and plaintiff, in consideration thereof, caused said Inglis to convey to defendant the land which had theretofore been conveyed by plaintiff to Inglis, and that at the time it was agreed between plaintiff and defendant "that said deed, though an absolute conveyance on its face, . . . should be treated and considered as a mortgage of said lands," to secure the payment to defendant of the amount so paid by him to Inglis, at the request of plaintiff.

The complaint further alleges, that thereafter the defendant repudiated the agreement under which he received the deed from Inglis, and claimed that the same was an absolute conveyance; and on October 6, 1885, he ousted plaintiff from the possession of said land, and has ever since withheld the possession thereof from plaintiff, and has kept and enjoyed all the rents and profits thereof.

The prayer of the complaint is, that the deed from Inglis to defendant be declared a mortgage, to secure the repayment of the money loaned by defendant to plaintiff, and the interest thereon; and that the court ascertain the value of the rents and profits of the land while in possession of defendant, and credit the amount thereof upon the indebtedness which the deed was intended to secure, and that upon payment of the balance due defendant, he be required to convey such land to plaintiff.

The answer of defendant contained a specific denial of all these allegations, and also pleaded a former judgment in an action between the same parties as a bar.

The court below found all of the allegations of the complaint to be true, and also that plaintiff's cause of action was not barred by the former judgment referred to in the answer,

and thereupon gave judgment in accordance with the prayer of the complaint, in which judgment the defendant was charged with the rental value of the land during the time he was in possession of the same, and was not allowed the value of certain improvements which he had placed thereon, or the amount of certain money advanced by him to plaintiff for the purpose of carrying on and improving the farm.

The defendant appeals from the judgment, and an order denying his motion for a new trial.

There were many exceptions taken during the trial and preserved by the defendant in the bill of exceptions, which forms a part of the record before us, but only the grounds upon which he mainly relies for a reversal of the judgment and order require discussion here.

1. The appellant insists with great earnestness that the finding of the superior court, that the deed executed to defendant by Inglis was in fact intended as a mortgage, is not sustained by evidence. But in our view, the evidence upon this material issue was conflicting in a substantial degree, and such being the case, under the rule which has often been declared by us, the finding of the trial court as to the fact must be allowed to stand. We fully agree with appellant that in actions of this character the presumption of law, independent of proof, is, that the instrument is what on its face it purports to be,—an absolute conveyance; and that this presumption should be allowed to prevail, unless the evidence offered to show that the deed was in fact intended as a mortgage is entirely plain and convincing: *Henley v. Hotelling*, 41 Cal. 22; *Cadman v. Peter*, 118 U. S. 74; *Coyle v. Davis*, 116 U. S. 108; *Whitsett v. Kershaw*, 4 Col. 419; 3 Pomeroy's Eq. Jur., sec. 1196. But whether the evidence is of such character and strength as to produce this conviction, is a question for the trial court to determine: *Brison v. Brison*, 90 Cal. 323. That court ought always to be governed, in weighing the evidence and reaching its conclusion as to the facts, by this rule, which requires the plaintiff, in an action like this, to present a case free from doubt; and unless the evidence is such as to leave in the mind of the trial judge a clear and satisfactory conviction that the instrument, which in form is a deed, was intended by all the parties thereto as a mortgage, the finding should be against the plaintiff. But we cannot say from the record which is before us that the superior court disregarded this rule in making its findings. The finding that

the deed was a mortgage does not rest upon the uncorroborated testimony of the plaintiff himself.

2. It is claimed by appellant that the court erred in admitting evidence as to the rental value of the land, and in charging him with such value. In support of this contention, it is argued by appellants that he should only have been charged with the actual or net profits which he derived from the use and occupation of the land. It is unnecessary, in passing upon the question thus presented, to determine what would be the basis upon which the account should be taken, in the absence of an express agreement as to the method, in the case of a mortgagee in possession with the consent of the mortgagor, and occupying himself, and not by a tenant. In this case the appellant's mortgage gave him no right to the possession of the mortgaged premises, and he did not take possession with the consent of the plaintiff. Upon this point the court finds that appellant wrongfully entered upon the premises and ousted the plaintiff from the possession thereof, and in such a case it is very clear to us that the appellant is liable to be charged for rents and profits, precisely the same as any other disseisor would be, and he is not entitled to any accounting to determine how much he may have actually realized from this wrongful occupation, after deducting the necessary expenses of carrying on the farm.

3. The court did not err in refusing to credit defendant with the value of the checks, ditching, and fencing placed by him on the premises while he was wrongfully in possession, and holding adversely to plaintiff. The possession of defendant and all that he did upon the land were acts hostile to the title of plaintiff, and plaintiff is not required, in this action, upon any principle of law or equity, to account to defendant for the value of the improvements thus made by him. It is claimed, however, that the fences were built with the knowledge and consent of plaintiff. It does appear from the evidence that plaintiff intended to do this fencing, and that defendant, before plaintiff was ousted from possession, had delivered upon the land a part of the lumber which was afterwards used in the construction of the fence. If it should be assumed that this lumber was furnished by the defendant at the request of plaintiff, and that plaintiff had accepted the same and intended to build this fence with it, still this would not be sufficient to prove the fact contended for, that defendant, after he took possession, constructed this fence for plain-

tiff, and with his consent. The fence was constructed by defendant for himself, and in the assertion by him of a right to exercise, adversely to plaintiff, dominion over the land upon which it was erected, and plaintiff cannot be made to pay for it, although it may appear that he would himself have built it if he had not been ousted from possession. If defendant has any right to recover from plaintiff the value of the lumber which was delivered on the land by defendant, while plaintiff was in possession, such right cannot be asserted here, as it was not furnished upon any agreement that the price thereof should constitute a lien upon the land, and the payment thereof to be deemed as secured by the mortgage deed held by the defendant.

4. The court below found that after defendant received from Inglis the deed already referred to, plaintiff executed to defendant a mortgage upon the crops to be raised upon the land during the year 1885, "as a further security to defendant for the payment to him, defendant, of such sum or sums as the defendant might thereafter advance to plaintiff, to farm or improve said premises, and as additional security for the payment by plaintiff of the amount paid by the defendant to Inglis" for plaintiff; and the court further found that defendant did advance to plaintiff "about the sum of eleven hundred dollars, for the purpose of farming and permanently improving said premises," and that plaintiff delivered to defendant all the grain raised on the ranch, for the purpose of repaying the same, and the interest on the other loan made by plaintiff to defendant.

The court does not find that the eleven hundred dollars referred to was repaid defendant, or that the grain delivered to him was sufficient for that purpose, and the appellant insists that he is entitled to a credit for the amount of this debt, whatever it may be, in his account with plaintiff in this action, and that the court erred in not ascertaining the amount, and providing in its judgment that the same should be paid before defendant is required to reconvey to plaintiff. We do not think the court committed any error in this respect. This indebtedness was not, by agreement of the parties, made a lien upon the land, but, on the contrary, the money seems to have been advanced by defendant upon an independent security, — that is, upon a mortgage upon the growing crops. The general rule is, that the mortgagee cannot require, as a condi-

tion of redemption, the payment of any other debt not a lien upon the land: Jones on Mortgages, sec. 1088.

It is argued, however, that as the plaintiff is here seeking the aid of a court of equity, he should be compelled to do equity; but this maxim of equity jurisprudence only applies when the relief sought by plaintiff and the right demanded by defendant belong to or grow out of the same transaction. It has no application where the demand of the defendant is based upon a contract separate and distinct from that which forms the subject of the plaintiff's action: 1 Pomeroy's Eq. Jur., secs. 385, 387.

The other matters referred to in the briefs of counsel do not require special discussion.

Judgment and order affirmed.

EVIDENCE TO CONVERT ABSOLUTE DEED INTO MORTGAGE must be clear, satisfactory, and conclusive: *Corbit v. Smith*, 7 Iowa, 60; 71 Am. Dec. 431; *Hogan v. Jaques*, 19 N. J. Eq. 123; 97 Am. Dec. 644; *Bauminger v. Bauminger*, 75 Iowa, 89; 9 Am. St. Rep. 432; clear and convincing: *Peagler v. Stabler*, 91 Ala. 308; *Lewis v. Bayliss*, 90 Tenn. 280; clear and satisfactory: *Langer v. Meservey*, 80 Iowa, 153; very satisfactory: *Wilson v. Parshall*, 129 N. Y. 223; strong and convincing: *Downing v. Woodstock Iron Co.*, 93 Ala. 261; clear, unequivocal, and convincing: *Cake v. Shull*, 45 N. J. Eq. 208; clear, explicit, and unequivocal: *Fisher v. Wilham*, 132 Pa. St. 438; *Jones v. Pierce*, 134 Pa. St. 533; so clear as to leave no substantial doubt that the real intention of the parties was to execute a mortgage: *Becker v. Howard*, 75 Wis. 415; sufficiently strong to command the unhesitating assent of every reasonable mind: *Etheridge v. Winer*, 86 Mich. 164. Where the parol evidence leaves the question doubtful, a court of equity will incline to hold it a mortgage: *Gilchrist v. Bennick*, 33 W. Va. 168. See, however, *Southard v. Curley*, 134 N. Y. 148; 30 Am. St. Rep. 642. The burden of proof rests on the party seeking to have the deed declared a mortgage; and whether the evidence in a particular case is sufficient, is generally for the determination of the court of original jurisdiction: *Ensign v. Ensign*, 129 N. Y. 255. In *Oebb v. Day*, 106 Mo. 278, the distinction was taken, that when the transaction had its inception in a loan, this rule as to the burden of proof ceases to be applicable.

MORTGAGES IN POSSESSION, DUTIES AND LIABILITIES OF: See note to *Oldstock v. Hall*, 4 Am. St. Rep. 69-71. A mortgagee in possession may make repairs, but he cannot make improvements at the expense of the redemptioners: *Horn v. Indianapolis Nat. Bank*, 125 Ind. 331; 21 Am. St. Rep. 231. On a bill against a mortgagee in possession, it is proper to take an account of the sum due on the mortgage debt and of the rents and profits received since the mortgagee has been in possession, after deducting the taxes and necessary repairs. The account will not be limited to rents actually received by the mortgagee, if it is shown that by reasonable diligence more could have been secured. If the reasonable rents and profits exceed the taxes, insurance, and necessary repairs, the surplus at the end of each year should be applied upon the mortgage debt: *Jackson v. Lynch*, 129 Ill. 72. That the rents and profits should be credited upon the amount of the mort-

gage debt, see also *De Conera v. Orefia*, 80 Cal. 132. A mortgagee in possession will not be held accountable for more rents than he actually received, unless he has been guilty of fraud or negligence; *Stevenson v. Edwards*, 98 Me. 622. As to the allowance of compensation for improvements to a bona fide possessor under claim of right, see note to *Barrett v. Stradl*, 9 Am. St. Rep. 806, 806.

MORTGAGES — PAYMENTS NECESSARY TO EFFECT REDEMPTION. — A mortgagor going into equity to redeem will be required to pay not only the mortgage debt, but all other debts due from him to the mortgagee: *Chamberlain v. Thompson*, 10 Conn. 243; 26 Am. Dec. 390. Nor can a grantee of part of the mortgaged land redeem his part without payment of the whole mortgage debt: *Smith v. Kelley*, 27 Me. 237; 46 Am. Dec. 596; *Street v. Beal*, 16 Iowa, 68; 85 Am. Dec. 504. On the other hand, when a mortgagee seeks to foreclose, the mortgagor may redeem, on paying the mortgage debt alone, though indebted to the mortgagee on other accounts: *Lee v. Stone*, 5 Gill & J. 1; 23 Am. Dec. 589.

STOCKTON SAVINGS AND LOAN SOCIETY v. GIDDINGS.

[98 CALIFORNIA, 84.]

PROMISSORY NOTE, DELIVERY OF. — Evidence tending to prove that a promissory note was given in payment of the obligation of a third person, and that it was made payable to, and was delivered to, and was received by the payee named therein as collateral security for debts due to him, does not show that the note was void for lack of delivery, but simply that the payee was the agent of the person to whom the obligation was originally due, and holds the note as collateral security.

PROMISSORY NOTE, VARYING TERMS OF. — Evidence tending to prove that the note sued upon was made payable to the payee therein named for the purpose of securing an indebtedness which was or might become due from a third person to such payee, and that such third person was and is the real party in interest, does not vary or add to the terms of the note, and is therefore admissible, when there is an offer to prove that a defense exists which would be enforceable were such third person the plaintiff in the action.

A SURETY MAY ASSERT THE DEFENSE OF FAILURE OF CONSIDERATION, though the principal is not a party to the action.

PROMISSORY NOTES — DEFENSES ASSERTABLE AGAINST NOMINAL PAYEE. — If the manufacturer of a machine sells it with the warranty that it is of a certain quality or will accomplish certain purposes, and procures a non-negotiable note to be given for the purchase price, but made payable to a third person to secure debts due and to become due the latter, such nominal payee is in no better a position than if the note had been given to the manufacturer and by him indorsed; and a defense arising from the worthless character of the machine may be asserted against such payee to the same extent as if he were an indorsee. The note is subject to all infirmities and defenses that might have been made if it were still held by the manufacturer, excluding those defenses which arose between him and the payor taking place after it was executed.

SURETY CANNOT PRESENT, BY WAY OF RECOUPMENT, a defense consisting of

a claim for damages resulting from a breach of warranty contained in a contract made with his principal. The latter alone can assert this claim.

SURETY IS ENTITLED TO PROVE, AS A DEFENSE, that the obligation upon which he is sued was given in payment for property purchased by his principal, and that the latter has rescinded the purchase on some ground authorizing such rescission.

C. P. Sprague, and Nicol and Orr, for the appellants.

W. L. Dudley and J. G. Swinnerton, for the respondent.

TEMPLE, C. This appeal is from the judgment, and was taken within sixty days after its rendition.

The action is upon a non-negotiable promissory note, made by the defendants first sued, and payable to plaintiff. Since suit was commenced, one of the original defendants, E. Giddings, has died, and the defendant L. M. Giddings, his executrix, has been substituted.

Several separate defenses are pleaded, or attempted to be pleaded, in the answer. They all deny the allegations of the complaint.

In the second they admit making the note, but deny that it was ever delivered to plaintiff, and aver that they believed, at the time of its execution, that a corporation known as Stockton Combined Harvester and Agricultural Works was the payee named therein, and that neither they nor either of them received any consideration therefor, except a promise made by that corporation, which has not been kept or performed.

By the third defense they aver that plaintiff is a corporation, and that at the time of the execution of the note one L. U. Shippee was its president and one of its managing agents, and was also at the same time president and one of the managing agents of the corporation known as the Stockton Combined Harvester and Agricultural Works; that at the same time a partnership, consisting of defendants E. E. Giddings, W. R. Giddings, and one James Sibley, engaged in farming in Tulare County, was solicited by the last-named corporation (which, for brevity, I will call the agricultural works) to contract for the manufacture of a machine known as the Shippee Combined Harvester and Shippee and Grattan Improvements; that the partners knew nothing of the machine, save through the representations of the agents of the corporation, who made certain representations as to its value and efficiency, which induced the partners to contract for the manufacture of one

of the machines, in which contract the corporation warranted that the machine would do good work, and was reasonably fit for the use for which it was purchased. The partners were to pay \$1,800 for the machine, and did then pay the sum of \$579.33 to the agricultural works; that the machine, when delivered, failed to perform good work, whereby defendants have been damaged in the sum of \$3,000; that plaintiff well knew, when it received the note, that neither plaintiff nor the agricultural works had ever paid any consideration for the note; that the note was indorsed as collateral security to plaintiff for debts due it from the agricultural works; that such debts had all been paid, and that the other corporation, the agricultural works, was solvent and able to pay all its debts; that E. Giddings signed the note simply as an accommodation to the partnership, and in case of recovery here, the partnership, including Sibley, who did not sign the note, will be held liable for any sum recovered.

In the fourth defense, very nearly the same facts are averred, so far as relates to the agricultural works and the other parties to the note, and that the contract of sale and the note were procured through the fraudulent representations of the agricultural works, and that the machine delivered was of no value whatever for any purpose.

In the fifth defense, the same matters are again alleged, but it is charged that the two corporations combined, conspired, and confederated together to cheat and defraud the partners named; that both and each of them made the false and fraudulent representations in regard to the machine which the partners agreed to purchase, relying upon and believing the false and fraudulent representations; that the machine was of no value for any purpose, and that, immediately upon discovering this fact, the vendees offered to return the same to the vendor, which then agreed to return the promissory note to the makers, and to repay the amount paid, provided said machine was not made to work satisfactorily within five days; that the partners, in pursuance of this contract, and the employees of the vendor, for five days then attempted to make the machine work, but wholly failed so to do, and such efforts proved the machine to be wholly valueless; wherefore the partners again offered to return it, but the agricultural works refused to accept it or to return the note or to refund the money, and has ever since refused to accept a return of the machine.

They also set out, specially, damage suffered in consequence of the fraud and breach of warranty, and ask judgment for a surrender of the promissory note, the refunding of the money, and that the agricultural works be brought in to answer their cross-complaint, that Sibley be permitted to intervene, and for general relief.

The case was tried with a jury. After the plaintiff rested, defendants proved, by the cashier of the bank, and by L. U. Shippee, who was president of both corporations, that the note was deposited in the bank by Shippee, and indorsed by him thus: "L. U. Shippee, Pres't S. C. H. and A. Works." The only consideration on the part of the bank was the indebtedness of the agricultural works, and debts thereafter to accrue,—in other words, the over-draft. As long as the note remained there, it was security for any money the agricultural works might owe, an arrangement having been made between the two companies by which all such notes belonging to the agricultural works were to be deposited there to secure the over-draft of the corporation; that Shippee knew that the note was for money due the agricultural works for the harvester. A series of questions was then asked the witness Shippee, by which the defendants attempted to prove all the allegations in their answer; each was objected to as immaterial and incompetent. All the objections were sustained, each ruling was excepted to, and all are brought here for review. In effect, they were: If the note was not delivered to the agricultural works instead of to the bank? If it was not the property of the agricultural works? What were the terms of the sale? If certain representations were not made, and warranties given, and if Shippee did not know at the time of each? If he did not know that the harvester was worthless, and as to the alleged offer to redeliver, and the refusal? What the consideration was? Certain letters written by agents of the bank and also of the agricultural works were offered, tending to prove some of the same matters, but all were excluded.

The questions were put in various forms, and each of the defendants was offered as a witness to prove the facts alleged in defense, but the court declined to receive their evidence, remarking that it intended to exclude all evidence as to dealings between defendants and the agricultural works.

The question is, Was the proposed evidence competent? And if so, was it material?

I cannot agree with the contention that the evidence which

defendants attempted to elicit, supposing the questions would have been answered favorably to them, would have shown that the note was void for lack of delivery. The theory of defendants was, that the note was intended for the agricultural works, and was given in payment for the machine. It is admitted that it was sent to Shippee for that corporation, and by him deposited with the plaintiff as collateral security for the over-drafts of the agricultural works. It appears that an arrangement existed between the two corporations, by which plaintiff was to take all the notes of the other as security for over-drafts. Presumably the bank was also to collect the notes. When, therefore, the note was made payable to the bank, it received it simply as agent of the agricultural works, and as collateral security for existing indebtedness, and for money thereafter to be advanced. The note was therefore not invalid for lack of delivery.

That the note was the property of the agricultural works, and was held by the bank only as security, sufficiently appears from the testimony of the president and cashier of the bank.

The evidence sought to be drawn out by the questions which were ruled out would have made the proof more explicit and satisfactory, and should have been admitted. This would not have been to vary or add to the terms of the instrument. It will not be controverted that a contract made in the name of an agent may not ordinarily be shown, either by the principal or the other party to the contract, to be nevertheless the contract of the principal; and the code, in putting the burden upon the payee of a note to disprove the sufficiency of the consideration, throws the door open upon that subject.

It is contended by respondent that the consideration of the note was solely the credits given to the agricultural works. The defendants sought to show that the consideration was, not the over-draft, but the purchase of a machine with a warranty, and that the warranty had failed, and the machine was worthless; that the consideration of the note had wholly failed.

This evidence was clearly admissible, if material to any issue in the case. That the pleadings are sufficient to raise the question will hardly be disputed, if it be admitted that these defendants are all in a position to raise it.

Sibley, one of the parties to the contract of sale, did not sign the note, and is not a party to this suit. The vendor

and warrantor is not a party to the suit. The plaintiff was not a party to the sale. One of the payors in the note, who is also one of the defendants sued, was not a party to the sale, but signed the note merely as surety.

If the surety, in his defense, can take advantage of the failure of consideration under these circumstances, it is plain that the absence of Sibley from the record is not fatal to the right of defendants to make this defense. This point will therefore be passed. The absence of the agricultural works from the record only raises the question as to what defenses may be urged against the indorsee.

The plaintiff is certainly in no better position than it would be if the note had been given to the agricultural works, and by it indorsed to plaintiff. I doubt if its position is as favorable as it would have been as indorsee.

If making the bank payee is evidence of immediate notice to the makers of the interest of the bank, it must also have the effect to place the bank in the position of payee as to such defenses as can only be made as against the original payee. The note, however, is not commercial paper, and it seems to me the bank holds it subject to all infirmities and to all defenses that might have been made if it were held by the agricultural works, not including, of course, possible defenses which might have accrued from subsequent transactions between the payors and the agricultural works, or claims against it subsequently acquired by assignment.

It was shown that the bank did not credit the agricultural works with the amount of the note. The transaction, therefore, did not amount to novation.

That the surety could not maintain a counterclaim is clear, for he could not bring an independent action upon the warranty, as he was not a party to it: *Chase v. Evoy*, 58 Cal. 348; *Roberts v. Donovan*, 70 Cal. 108.

It would naturally seem that the liability of a surety could not be greater than that of the principal, and that the agricultural works ought not to be enabled to recover in this way the price of a worthless machine, in violation of its express contract. But if it be necessary to consider the defense in the nature of a recoupment, it cannot be done. The difficulties in the way of such a defense are well stated by Judge Selden, in *Gillespie v. Torrance*, 25 N. Y. 306; 82 Am. Dec. 355.

The suit was against the accommodation indorser of a note given for timber sold with a warranty, a breach of which was

attempted to be set up in defense. The learned judge remarks that if the defense be regarded as a failure of consideration, in whole or in part, the surety can undoubtedly urge the defense; but he proceeds to argue that the claim is to recoup the damages for a breach of the contract of warranty; that often the damages might amount to more than the claim, and it is optional with the vendees, when they are sued for the price, to recoup or to bring an independent action for damages; that, before the code, if he elected to recoup, he could not recover for a balance in his favor. He therefore concludes that such damages constitute a counterclaim, and not a mere failure of consideration, and not being due to defendant, he cannot set it up; he cannot elect for the vendee whether to plead it as a defense, or bring another action to recover it. If he could, he might bar the right of the parties to the warranty to recover damages for its breach, for there could not be two recoveries; the right would exist where the note of the surety was for only a small part of the purchase price, and would amount to a practical release of the vendor of the greater part of his liability. In conclusion, the learned judge says: "In the case which was shown on the trial, there would seem to be a strong equity in favor of the defendant to have the note canceled or reduced, by applying towards its satisfaction the damages which appear to be due Van Pelt for the breach of warranty. It is, however, an equity in which Van Pelt is interested to as great, and possibly to a greater, extent than the defendant, and cannot be disposed of without having him before the court, so that his rights, as well as those of the defendant, may be protected."

There are many other cases to the same general effect; while the cases of *Wade v. Scott*, 7 Mo. 509, and *Scroggin v. Holland*, 16 Mo. 419, seem to be the other way. The difficulties in the way of this defense, as stated by Judge Selden, seem to me insurmountable, and they are not diminished by the code provision: Code Civ. Proc., sec. 438.

This reasoning, of course, applies only to the claim on the part of the defendants of a right to recoup damages for the breach of warranty by way of set-off to the plaintiff's demand. As to the defense of fraud, more may be said. It is sometimes said that fraud vitiates the contract; but, ordinarily, that only means that a party may avoid the contract on that ground, but if he does not elect to do so, he is bound by his contract, and in such case the surety cannot set it up as a de-

fense. If the claim be for damages on account of fraud, the surety cannot avail himself of the defense, for the reasons already given.

The surety may always avail himself of the defense of failure of consideration, in whole or in part, and it seems to me it would necessarily follow that he may avail himself of the fact that the sale has been rescinded on any ground whatever which would authorize the rescission. Under our code (Civ. Code, sec. 1786), a breach of warranty entitles the buyer to rescind. In the case of *Gillespie v. Torrance*, 25 N. Y. 306, 82 Am. Dec. 355, it was assumed that no such right existed. On this point, therefore, that case is not authority here. The answer sets up facts which, if true, would constitute a rescission, and the questions which were ruled out called for evidence which would have tended to make out such defense.

To such practice I can see no possible objection. If a contract has been canceled as between the original parties, there remains no consideration for the promise of the surety, except in the case of commercial paper which has passed into the hands of an innocent holder. We are not considering here what might be the consequences in another case. This suit is between the original parties to the contract.

It would seem to follow that the court erred in excluding the evidence, as well as in instructing the jury to find for the plaintiff.

I advise that the judgment be reversed and a new trial awarded.

BELCHER, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion, the judgment is reversed, and a new trial ordered.

McFARLAND, J., DE HAVEN, J., SHARPSTEIN, J.

NEGOTIABLE INSTRUMENTS, PAROL EVIDENCE AS TO. — As to the admissibility of parol evidence to show the true relation of the parties, see note to *Kulenkamp v. Groff*, 15 Am. St. Rep. 287. A note signed by two obligors, and made payable to "order of myself," may be shown by extrinsic evidence to be payable to one of such obligors, and to bind the other obligor thereon to the payee, and a third party, who holds the note by indorsement from the payee, may hold both obligors bound thereon: *Jenkins v. Bass*, 88 Ky. 397; 21 Am. St. Rep. 344. So, also, to prove that there was no valid delivery of a note, or a delivery thereof for a special purpose only, parol evidence is admissible: *Solenberger v. Gilbert*, 86 Va. 778. Possession of a note by a payee is only *prima facie* evidence of delivery: *McFarland v. Sykes*, 54 Conn. 250; 1 Am. St. Rep. 111. And a defendant, when sued as indorser, may show by parol evidence that it was agreed by the payee's agent that the payee

would look to the maker alone, and the collateral security agreed to be given by him, and that the defendant should not be held liable on his indorsement: *Cake v. Pottsville Bank*, 116 Pa. St. 264; 2 Am. St. Rep. 600.

NEGOTIABLE INSTRUMENTS — DEFENSES. — Defect or failure of consideration of note may be given in evidence against payee, or indorsee with notice: *Le Blanc v. Sanglair*, 12 Mart. (La.) 402; 13 Am. Dec. 377; *Brewer v. Harris*, 7 Smedes & M. 84; 41 Am. Dec. 587; *Smith v. Busby*, 15 Mo. 387; 57 Am. Dec. 207.

COUNTERCLAIM: See, generally, note to *Woodruff v. Garner*, 89 Am. Dec. 422-492. In an action against a surety, the defendant may set off a debt due from the plaintiff to the principal debtor, if the latter is a party and insolvent: *Becker v. Northway*, 44 Minn. 61; 20 Am. St. Rep. 643.

BRADFORD v. PARKHURST.

[86 CALIFORNIA, 102.]

VENDOR AND VENDEE. — FAILURE OF THE VENDOR TO TENDER A CONVEYANCE when the purchase price became due, or according to the terms of the contract of sale, does not show that there has been a mutual abandonment and rescission of the contract.

VENDOR AND VENDEE. — THOUGH A CONTRACT OF SALE WAS SIGNED BY THE VENDOR ONLY, and he, for that reason, could not have maintained an action for the balance of the purchase price, yet he may be compelled to accept such balance, and thereupon to make a conveyance, and therefore such part of the purchase price as has been paid is not without consideration, and cannot be recovered by the vendee.

VENDEE CANNOT, AT HIS ELECTION, ABANDON HIS CONTRACT OF PURCHASE, signed by the vendor alone, and recover moneys paid thereon, though the contract declared that if the balance of the purchase price were not paid by a day designated, it should become null and void, and all payments made thereon should be forfeited, and the vendor did not tender a conveyance, nor make a demand for payment, until after that day passed.

George B. Graham, for the appellant.

Church and Cory, for the respondent.

TEMPLE, C. This appeal is from a judgment, and an order refusing a new trial.

The action is for money had and received for plaintiff's use, and for interest on "divers sums forborne by plaintiff to defendant, at his request."

The statement shows that between January 9 and March 31, 1888, defendant executed to plaintiff and his assignors seven contracts for as many distinct parcels of land.

The contracts are alike, and are in the form of receipts for specified sums of money, part of the purchase price, followed

by a recital as follows: "Leaving a balance . . . to be paid on said purchase, which, by the terms of this sale, is to be paid in three equal payments, with interest at the rate of ten per cent per annum till paid, in like gold coin, within six, twelve, and eighteen months from date hereof. If paid as above stated, with all taxes, assessments, and charges of every nature that are or may be levied thereupon before the final payment and costs of conveyance, the above-named W. Bradford will be entitled to a deed for the above-described lot; otherwise this agreement becomes null and void, and the amounts now paid, together with all improvements on said land made, shall be forfeited. . . . If forfeited, the said W. Bradford shall thereafter be, and he hereby consents to be, tenant of D. W. Parkhurst, liable to be dispossessed upon three days' notice," etc.

The contracts are signed only by the vendor.

It was not shown, or attempted to be shown, that defendant had failed or refused to perform any part of his contract. On the other hand, it appears from the evidence that plaintiff, after having made the first payment, on being asked whether he intended to perform, said that he would make no more payments, and "I will see my attorney, and would like to see you get it."

The evidence also shows that defendant tendered to plaintiff a deed in pursuance of the contract, but the tender was after the time limited for performance; and appellant contends that time being of the essence of the contract, the tender was not effectual, and that defendant was in default; in short, that there had been a mutual abandonment and rescission of the contract, under the rule laid down in *Cleary v. Folger*, 84 Cal. 316; 18 Am. St. Rep. 187. As that case has been overruled on this point by the recent case of *Newton v. Hull*, 90 Cal. 487, this contention must fail.

Now, if we concede the law to be as appellant contends, that the contract could not have been enforced by defendant, because the agreement of the plaintiff was not put in writing, it does not follow that this suit can be maintained. Although defendant might not have been able to maintain an action for the purchase-money, he was compelled to accept the money when tendered as payment upon the contract. This follows, necessarily, if it could have been enforced by plaintiff. The payment was founded upon a valuable consideration, and the consideration has not failed.

Appellant relies upon *Drew v. Pedlar*, 87 Cal. 448, 22 Am. St. Rep. 257, as sustaining his position. But that case does not go to the extent of holding that a vendee can elect to consider the contract at an end, and recover what he has paid, when the vendor has not abandoned the contract. On that point that decision is explained by the more recent case of *Phelps v. Brown*, 95 Cal. 572, as follows: "When a contract of sale and purchase of lands is abandoned or rescinded by the parties, the vendee, though in default, may recover back installments paid of the purchase-money, less the actual damage to the vendor occasioned by his breach of the contract." This proposition cannot be controverted. It is old law: *Palmer v. Temple*, 9 Ad. & E. 508. The debatable point before these decisions was, whether, in all cases when one party to a contract declines to go on with it because some material condition precedent has not been performed by the other party, he thereby abandons it so as to entitle a recovery for sums paid. No such question is involved here. The payments were made in part consideration for a conveyance which the plaintiff can have whenever he chooses to comply with his contract.

I advise that the judgment and order be affirmed.

BELCHER, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order are affirmed.

PATERSON, J., HARRISON, J., GAROUTTE, J.

VENDOR AND PURCHASER. — When a vendee enters upon the performance of a contract to purchase, and after paying a part of the consideration, makes inexcusable default, he cannot maintain an action to recover the money so paid: *McManus v. Blackmarr*, 47 Minn. 331. The fact that the vendor, within thirty days after the making of the contract, did not tender the purchaser a deed does not show a default of the vendor entitling the purchaser to rescind a contract, if the purchaser failed to tender the purchase-money and demand the deed. Neither party can put the other in default except by tendering a performance on his part, unless the other waives the tender, or his conduct renders it unnecessary: *Dennis v. Strassburger*, 89 Cal. 583. The vendor is not in default until his refusal to convey upon a tender of the purchase-money: *Easton v. Montgomery*, 90 Cal. 307; 25 Am. St. Rep. 123; even after the last installment is overdue: *Newton v. Hull*, 90 Cal. 487.

VENDOR AND PURCHASER — UNILATERAL CONTRACTS. — The statute of frauds only requires the vendor to sign the contract or memorandum for the sale of lands: *Ballou v. Sherwood*, 32 Neb. 666; and such a contract may be enforced by the vendee: *Ida v. Leiser*, 10 Mont. 5; 24 Am. St. Rep. 17; or if the vendee is the party signing, by the vendor: *Miller v. Cameron*, 45 N. J. Eq. 95; the general rule being that a unilateral contract is binding only on

the party who signs it, and is binding upon him only during the period for which the privilege of carrying out the contract is granted: *Coleman v. Applegarth*, 68 Md. 21; 6 Am. St. Rep. 417. Where the contract is signed by the vendor only, the payment of a deposit by the purchaser is a sufficient acceptance by him of the terms of the contract: *Benson v. Shetwell*, 87 Cal. 49; and the purchaser is entitled to a conveyance upon his payment or tender of the agreed price to the vendor at any time within the period stipulated, and may enforce a specific performance of the agreement as soon as such payment or tender is made: *Warner v. Darrow*, 91 Cal. 309.

VENDOR AND PURCHASER — ENFORCEMENT OF THE CONTRACT AFTER THE TIME OF PERFORMANCE IS PASSED. — When the time for payment of the purchase-money and for delivery of the deed has passed without performance, or tender thereof, by either party, the time for performance becomes indefinite, and whichever of the parties first desires to enforce the contract, he must perform, or offer to perform, his part of it, as a condition precedent: *Boyd v. McCullough*, 137 Pa. St. 7. Where time is of the essence of the contract for payments on the part of the purchaser, and the vendor is released from all obligation upon his default, the failure of the purchaser to make the payments provided for does not render the contract void as to the vendor, or prevent its enforcement by him; and the fact that the vendor did not tender a deed and demand the purchase price until some months subsequent to the date fixed by the contract for final payment, does not prevent the vendor from claiming a specific performance of the contract: *Bentley v. Arnold*, 91 Cal. 606.

MOFFATT v. BULSON.

[36 CALIFORNIA, 106.]

PUBLIC LANDS. — A CONTRACT TO SELL AND CONVEY LANDS taken up under the homestead laws, made before final proof, is illegal and void.

CONSIDERATION, ILLEGALITY OF, WHEN MAY BE SHOWN. — The merger of an oral contract for the sale of land, in a conveyance and mortgage executed in pursuance of such contract, cannot prevent the maker of a promissory note secured by such mortgage from showing that it was executed in pursuance of such contract and was based upon an illegal consideration.

CONSIDERATION OF A DEED may be proved by parol to be wholly different from that expressed therein.

ENTIRE CONTRACT ILLEGAL IN PART. — If an oral agreement is made for the sale of land, one part of which the vendor had filed upon under the desert-land act, while to the residue he had a perfect title, and such agreement is afterwards consummated by a conveyance of the land to which the title was perfect, and the delivery of possession of the whole tract, and a further agreement is made that as soon as title can be procured for the other tracts they will also be conveyed, and a note and mortgage are given for the balance due, the contract is entire, and, being partly founded upon an illegal agreement for the conveyance of the lands to be acquired, is, by the code of California, wholly void, and the note and mortgage cannot be enforced, though the mortgages, after their execution, acquired title to the whole property.

PLEADING ILLEGALITY OF CONSIDERATION. — If an answer contains allegations which, if true, show that a contract for the sale of land was founded upon an illegal consideration, this is a sufficient pleading of such illegality, though the answer complains of the non-performance of the contract.

E. T. Hogan, and Reddy, Campbell, and Metson, for the appellant.

Goodwin and Goodwin, for the respondent.

HAYNES, C. This action was brought to foreclose a mortgage made by respondent to appellant. The note and mortgage were made March 5, 1888, the note being for five thousand dollars, payable in annual installments of five hundred dollars, together with annual interest on the principal unpaid at ten per cent per annum. The answer alleged that on December 22, 1886, plaintiff was in the possession and actual occupancy of a certain ranch known as the Moffatt and Rable ranch, containing 560 acres, 80 acres of which he had filed upon under the desert-land act; that another part of said ranch, containing 160 acres, plaintiff had filed upon under the homestead act; and that plaintiff had title in fee to the remaining 320 acres, but had not made final proof or payment for either of said tracts of government land; and that plaintiff also owned certain personal property then upon said ranch, consisting of horses, farming implements, furniture, etc.; that on said twenty-second day of December, 1886, plaintiff and defendant made an oral contract, whereby plaintiff agreed to sell to defendant the whole of said ranch and personal property for the sum of \$10,000, and to convey to defendant said 320 acres to which he had title, and deliver said personal property, and to put defendant in possession of the whole of the ranch, upon the payment of one half of said purchase-money, at which time defendant was to execute to plaintiff his promissory note for the remaining \$5,000, and a mortgage upon the 320 acres so conveyed to him, to secure said note, and that plaintiff further agreed to obtain title as soon as possible to said tracts of government land, and as soon as he had done so, to convey them to defendant; that on March 5, 1887, he paid plaintiff \$5,000; that plaintiff then conveyed to him said 320 acres, and delivered to him the possession of all said ranch and personal property, and defendant made and delivered said note and mortgage upon which this suit was brought; that on the 24th of March, 1887, plaintiff made final proof and payment upon said homestead entry, and obtained his certificate of purchase thereof, and on September

ber 24, 1888, he made final proof and payment under his desert-land entry, and obtained a certificate of purchase of the same. He further alleged, that prior to March 5, 1888, and at sundry times afterwards, he demanded of plaintiff a conveyance of said desert-land and homestead tracts, but that plaintiff then and ever since refused to convey the same. It also appeared from the complaint, as well as from the answer, that on August 4, 1888, defendant paid on the note and mortgage \$1,040.66. The court found upon all the issues raised by the answer in favor of defendant, and as conclusions of law found that the contract was entire; that it was illegal, so far as it related to the homestead land; that plaintiff and defendant were equally in the wrong in entering into said contract; that the consideration of said note and mortgage could not be enforced; and that the action should be dismissed, without costs. The appeal is taken from the judgment dismissing the action, upon the judgment roll alone.

That a contract to sell and convey lands taken up under the homestead laws, made before final proof, is illegal and void is not disputed: U. S. Rev. Stats., sec. 2262. The learned counsel for appellant contend, however, that the oral agreement was void under section 1624, subdivision 5, of the Civil Code, as well as illegal under subdivisions 1 and 2 of section 1667. Upon these propositions, they contend that as all the negotiations, including the offer of defendant to purchase, and the acceptance of the offer by plaintiff, were oral, the execution of the deed by plaintiff, and of the note and mortgage by defendant, on the 5th of March, 1887, not only eliminated the illegal element from the agreement, but that the execution of these instruments constituted the only contract between the parties, and superseded the oral negotiations or stipulations concerning the matter or subject referred to which preceded or accompanied their execution, and that what the subject-matter of the contract was is to be ascertained from the deed and mortgage; citing Civ. Code, sec. 1625. There is no doubt of the correctness of counsel's contention in a case to which section 1625 of the Civil Code applies; but that section has never been construed to prevent a defendant who has been sued on a promissory note, whether secured by mortgage or not, to show by parol evidence a want, or failure, or illegality of consideration. Section 1962 of the Code of Civil Procedure enumerates all the conclusive presumptions of law, and section 1963 of the same code provides: "All other presumptions

are satisfactory, if uncontradicted. They are denominated 'disputable presumptions,' and may be controverted by other evidence. The following are of that kind: . . . 21. That a promissory note or bill of exchange was given or indorsed for a sufficient consideration. . . . 39. That there was a good and sufficient consideration for a written contract." See also Civ. Code, secs. 1614, 1615. Subdivision 2, section 1962, of the Code of Civil Procedure, excepts from the conclusiveness of a written instrument the recital of a consideration. The deed executed by the plaintiff to defendant is not in the record, and it cannot be presumed that it contained any recital or provision not necessary to its operation as a conveyance of the parcel of land conveyed thereby. Even if it did, it would not be conclusive; for while "the general rule of law is, that recitals in a deed bind all persons who are parties or privies thereto, it does not extend to that which is mere description, or an averment that is not essential": *Osborne v. Endicott*, 6 Cal. 153; 65 Am. Dec. 498; *Ingersoll v. Truebody*, 40 Cal. 610; *Rhine v. Ellen*, 36 Cal. 362.

These cases conclusively show that "the grantee may prove by parol that the consideration was wholly different from that expressed in the deed, and depends upon conditions which had not happened, and might never happen." If, therefore, neither a promissory note nor a deed excludes parol evidence of the consideration, it is difficult to conceive any reason or rule of law which could have precluded the court from receiving oral testimony showing the contract to have been entire, and that a single consideration existed for the transfer of all the property. Section 1625 of the Civil Code did not change the law in relation to written instruments. In *Davenport v. Mason*, 15 Mass. 90, the court, after reciting the general rule that parol evidence is inadmissible to contradict or vary the terms of a deed, added: "But parol evidence may be admitted to establish an independent fact, or to prove a collateral agreement incidentally connected with the stipulations of a deed or other written contract." See also *McCrea v. Purmort*, 16 Wend. 460; 30 Am. Dec. 103. In the case at bar the only connection between the deed and the facts proved by parol and found by the court was incidental, and in no way tended to change or contradict any part of the deed essential to its operation as such. The facts that on the same day plaintiff delivered the personal property, and also put defendant in possession of both the tracts of government land, as well as

that conveyed by the deed, were quite sufficient to show a prior agreement relating thereto, and were sufficient acts of part performance to have made oral testimony of the terms of such agreement competent as a basis for the specific performance of it: *Pomeroy on Specific Performance*, secs. 107, 115. Indeed, the contention of counsel, if carried to its logical conclusion, would defeat the equitable ground of relief based upon part performance of an oral agreement,—at least, in cases where more than one parcel of land was agreed to be conveyed, after one of them had in fact been conveyed. The court, so far as its legal right to do so was concerned, properly found that the contract was entire, and upon this record that finding can be questioned upon no other ground. Counsel's contention that the findings do not support the judgment, and that the answer does not state facts sufficient to constitute a defense, are based upon the ground already discussed, viz., that the deed, note, and mortgage superseded the oral negotiations which preceded, and that oral evidence of the original verbal contract could not be received or considered. It is, however, further urged that the answer does not set up either illegality or want of consideration, but, on the contrary, complains of the non-performance of the contract on the part of the plaintiff. The answer alleges the facts from which the several conclusions mentioned may be drawn, and in a pleading they would be mere conclusions of law, not necessary to be alleged. If the answer had not alleged that one of these tracts of land was taken up under the homestead act, no illegality would have appeared, and the defense would have been non-performance of the contract on the part of the plaintiff. The court, however, found the contract to be entire, and so within section 1608 of the Civil Code, which provides: "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void." If the illegal element had not been introduced into the oral contract of December, 1886, defendant might have successfully insisted upon a specific performance of that contract; but if that contract was illegal, no action can be maintained upon unexecuted portions of it, and upon that ground, also, plaintiff's action could not be maintained. The subsequent acquirement of the land by certificate of purchase did not confer a right of action: *Ladda v. Hawley*, 57 Cal. 51. No error appearing upon the record, I advise that the judgment be affirmed.

TEMPLE, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

McFARLAND, J., DE HAVEN, J., SHARPSTEIN, J.

PUBLIC LANDS — ALIENABILITY OF SETTLERS' RIGHTS. — It was the policy of Congress, in passing the pre-emption and homestead laws, to confine their benefits to actual settlers upon the public lands, and to prohibit all contracts and undertakings entered into prior to the issuing of the final certificate of entry, by which the benefit of the entry would inure directly or indirectly to any third party; all assignments and transfers of the pre-emption right are therefore null and void: *Olson v. Stuyvesant*, 132 Ill. 607. This case holds that a title obtained in pursuance of an agreement to convey after final proofs have been made is not sufficiently good to furnish the basis of an action for specific performance; but a contrary doctrine was announced in *Bowme v. Wolcott*, 1 N. D. 415, on the ground that such a title is good against all the world except the United States, and that, as the question of forfeiture by reason of the existence of a prior parcel contract to convey can only be raised by the United States, a state court cannot anticipate the action of the federal officers. The rule recognized by the Illinois case has been applied to contracts regarding the public lands of Texas: *Houston v. Killough*, 80 Tex. 296; and the additional homesteads of soldiers: *Nichols v. Council*, 51 Ark. 26; 14 Am. St. Rep. 20. But in California a different doctrine concerning soldiers' homesteads prevails: *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 234; 23 Am. St. Rep. 122; *Rose v. Nevada etc. Wood Co.*, 73 Cal. 385; *Stewart v. Sutherland*, 93 Cal. 270. A person cannot enter public lands under the pre-emption laws in trust and for the benefit of another, and the courts will not decree that the title acquired by a pre-emption entry from the government inured to the benefit of any other person: *Robinson v. Jones*, 31 Neb. 20. On the other hand, it has been held that a valid mortgage of land entered as homestead may be made by the claimant after he has received his final certificate, and before the patent: *Lewis v. Wetherell*, 36 Minn. 386; 1 Am. St. Rep. 674; before he has made his final proof, and received the certificate therefor: *Lang v. Morey*, 40 Minn. 296; 12 Am. St. Rep. 748; and even before entry under the homestead act: *Kirkaldie v. Larabee*, 31 Cal. 455; 89 Am. Dec. 205. It seems difficult, on principle, to reconcile these rulings, as to the permissibility of mortgaging public lands to which the occupant has not obtained a perfect title, with the doctrine which prohibits agreements to alienate those lands after title is obtained. A future transfer of title can be arranged just as easily and effectually by a mortgage which may be foreclosed after the title is perfected, as by a contract to convey, and the practical results of the two transactions are precisely the same. It is true that the occupant, who has made a mortgage with the understanding that it is to be foreclosed after the issue of the patent, might prove the inherent illegality of the proceeding as a fraudulent evasion of the land laws, and thus defeat the foreclosure; but as the actual working of the statutory prohibition of agreements to convey depends entirely upon the willingness of the patentee to disclose the illegal promise, the situation of the fraudulent mortgagee in the former case seems to be virtually as perilous as that of the fraudulent contractee in the latter. There is, accordingly, no mere reason for supposing that the dishonest capitalist, against whose machina-

tions the prohibition was presumably directed, is more effectually deterred from making the agreements, which it is the policy of the law to prevent, by the knowledge that he cannot enforce a contract to convey, than he is by the knowledge that a mortgage which he holds may be avoided as a colorable evasion of the land laws of the United States. For these reasons it would apparently have been more consistent to have declared mortgages, as well as agreements to convey, invalid. The law as at present announced by the authorities seems to be open to the objection that it allows that to be done indirectly which it forbids to be done directly. See, further, *McCus v. Smith*, 9 Minn. 252, 86 Am. Dec. 100, in which an agreement that an advance should be a lien on the land was held to be illegal; and *Woodbury v. Dorman*, 15 Minn. 338, in which a similar doctrine was announced. But both of these cases were overruled in *Jones v. Tainter*, 15 Minn. 512. As to conveyances of pre-emptioners' interests generally, see note to *Tyler v. Green*, 87 Am. Dec. 133, 134.

EVIDENCE AS TO CONSIDERATION, showing it to be illegal, may always be given: *Patton v. Gilmer*, 42 Ala. 548; 94 Am. Dec. 665; or showing it to be different from that named in the writings: *Groves v. Steel*, 2 La. Ann. 480; 46 Am. Dec. 551; *Rockhill v. Spraggs*, 9 Ind. 30; 68 Am. Dec. 607.

ENTIRE CONTRACT is founded upon an indivisible consideration, part of which is illegal: *Filson v. Himes*, 5 Pa. St. 452; 47 Am. Dec. 422. But if, for good and valid consideration, one promises to do two things, one legal and the other illegal, the former is binding, unless the two are so mingled and bound together that they cannot be separated, in which case the whole is void: *Hanauer v. Gray*, 25 Ark. 350; 99 Am. Dec. 226.

[IN BANK.]

WARD v. MARSHALL.

[96 CALIFORNIA, 155.]

PUBLIC OFFICERS—SALARY.—AN OFFICER SUSPENDED FROM OFFICE under and by virtue of a judgment convicting him of willful misconduct in office is, upon the reversal of the judgment, entitled to his salary during the period of such suspension, though the statute provided that during his suspension the office must be filled as in case of a vacancy, and it was so filled, and the salary paid to the incumbent.

JUDGMENT.—THE EFFECT OF THE REVERSAL OF A JUDGMENT is to leave the parties where they stood before its rendition.

PUBLIC OFFICERS.—THE RIGHT TO RECEIVE THE SALARY IS AN INCIDENT which attends the legal title to the office.

Raleigh Barcar, for the appellant.

O. P. Dobbins, for the respondent.

DE HAVEN, J. The plaintiff was a justice of the peace within the county of Solano, and on April 29, 1889, was accused by the grand jury of that county of willful misconduct in office. He was tried upon this accusation, and convicted;

and on June 17, 1889, the superior court made and entered its judgment in the proceeding, removing him from his office. In December following, the plaintiff took an appeal to this court from that judgment, and on September 10, 1890, the judgment was reversed. One of the grounds for the reversal was, that the accusation against plaintiff did not state facts sufficient to authorize the judgment: *People v. Ward*, 85 Cal. 585. On July, 22, 1889, the board of supervisors of the county appointed one Parker to the office from which plaintiff had been removed by the judgment of the superior court. Parker qualified and discharged the duties of such office until the judgment removing plaintiff was reversed by this court, and the county paid to him the amount of the salary of such office during that period.

The defendant here is the auditor of Solano County, and this is a proceeding to compel him to draw his warrant on the treasurer of that county, in favor of plaintiff, for the salary attaching to the office referred to, between the date of the judgment of the superior court removing plaintiff therefrom and the reversal of that judgment by this court.

The superior court gave judgment in favor of defendant, and the plaintiff appeals.

It will be seen from the foregoing statement of facts that the sole question for decision here is, whether appellant is entitled to the salary of the office to which he was elected, and for which he had duly qualified, during the time he was suspended from the performance of its duties by the erroneous judgment of the superior court.

It is claimed by respondent that, under section 770 of the Penal Code, which provides for an appeal from a judgment of removal from office, this question must be answered in the negative. That section is as follows: "From the judgment of removal an appeal may be taken to the supreme court, in the same manner as from a judgment in a civil action; but until such judgment is reversed, the defendant is suspended from his office. Pending the appeal, the office must be filled as in case of a vacancy." This section does very clearly provide that until the judgment of removal is reversed the defendant in the proceeding is suspended from his office, and that, pending the appeal, the office must be filled as in case of a vacancy, but there is nothing in this provision inconsistent with the right of such officer to receive the salary attached to his office if the final judgment in the proceeding

shall be in his favor. The section must be construed as a whole, and the first sentence thereof, which gives to a defendant in such a proceeding the right to appeal from the judgment, must be allowed to accomplish its obvious purpose. Nothing can be clearer than that the legislature by this provision intended that the rights of a defendant in such a proceeding—his right to hold the office and receive its emoluments—should not be finally determined against him by the judgment of the superior court; and the right of appeal given by this section, in the absence of a clear and explicit declaration to the contrary, must be held to secure to a defendant, if successful upon such appeal, the usual results, which, as between the parties to it, flow from the reversal of a judgment, to wit, the restoration of all rights which had been taken from him by such erroneous judgment. The effect of a reversal of a judgment is to leave the parties where they stood before its rendition: *Phelan v. San Francisco*, 9 Cal. 16; *Crispen v. Hanwovan*, 86 Mo. 168; *Elliott's Appellate Procedure*, sec. 580.

And this was the effect of the reversal of the judgment in the proceeding brought by the people of the state to remove plaintiff from his office, and he then became entitled to recover the salary, of which he had been deprived by the erroneous judgment of the superior court. The right to receive such salary was not finally lost to him by such judgment, but only suspended during the period that it remained unreversed. The plaintiff, by virtue of his election and qualification as justice of the peace, became entitled to the salary attached to such office during the term, if he should live so long, and was not guilty of any misconduct for which he should be removed, or did not otherwise forfeit his legal title to such office. The right to receive the salary is an incident which attaches itself to the legal title to the office: *People v. Smyth*, 28 Cal. 21; *Burke v. Edgar*, 67 Cal. 182; *People v. Potter*, 63 Cal. 127; *Fitzsimmons v. City of Brooklyn*, 102 N. Y. 536; 55 Am. Rep. 835; *Andrews v. Portland*, 79 Me. 484; 10 Am. St. Rep. 280. And when an officer is accused of misconduct in office, and an action brought to remove him therefrom, the question of his guilt or innocence can only be determined by the final judgment in the proceeding; and when, in the action brought against plaintiff, it was finally adjudged that he was not guilty of the misconduct charged against him, or that the accusation itself did not state facts which would justify his removal, the litigation was then ter-

minated in his favor, and it would be unreasonable to hold that notwithstanding the final judgment, to the effect that he had done nothing to warrant his removal from office, yet he had, by the erroneous and reversed judgment, been deprived of all that made the office of any pecuniary value.

The fact that during the time of this suspension from office its duties were performed by a person properly appointed for that purpose, and that the county has paid him the salary, does not affect the right of plaintiff to recover. He was, without fault on his part, and against his consent, released from the performance of the duties of such office for the period named: *Fitzsimmons v. City of Brooklyn*, 102 N. Y. 536; 55 Am. Rep. 835; *Andrews v. Portland*, 79 Me. 485; 10 Am. St. Rep. 280.

Judgment reversed.

OFFICERS — SALARY. — Officer of a city may recover his salary during a time when he has been wrongfully removed from the office, though the city paid such salary to the incumbent of the office who held it during the period of his suspension: *Andrews v. Portland*, 79 Me. 484; 10 Am. St. Rep. 280, and note containing a review of the authorities.

APPEAL — EFFECT OF REVERSAL OF JUDGMENT. — Reversal of judgment restores parties to their original rights, so far as this can be done without prejudice to the rights of third parties: *McJilton v. Love*, 13 Ill. 486; 54 Am. Dec. 449; *Tarleton v. Goldthwaite*, 23 Ala. 346; 58 Am. Dec. 296.

OFFICERS. — Salary is an incident of office, and belongs to the person holding the legal title to the office: *State v. Orr*, 129 Ind. 44; 38 Am. St. Rep. 162.

DELANO v. JACOBY.

[36 CALIFORNIA, 375.]

PLEADING. — GENERAL DENIAL, WHEN THE COMPLAINT IS VERIFIED, and the answer also contains specific denials, raises no issue.

CO-TENANCY. — PAYMENT TO EITHER OF TWO PAYEEs named in a promissory note extinguishes it.

DEEDS — EASEMENT ACQD. — A POWER OF ATTORNEY to convey real property, otherwise valid, is good between the parties, whether acknowledged and recorded or not.

POWER OF ATTORNEY, WHEN AUTHORIZES A CONVEYANCE. — Mere authority to sell does not, as a general rule, in the absence of any words or circumstances qualifying the language, empower the attorney to execute a conveyance.

PRINCIPAL AND AGENT — RATIFICATION. — Though a power of attorney to sell land does not authorize a conveyance to be made, yet if the agent, acting under the power, makes a conveyance as well as a sale, and the

principal, being informed thereof, approves what has been done in his name, and accepts notes and mortgages given by the purchaser, and insists upon their payment, he ratifies the conveyance, and the effect of the power of attorney under which the agent acted becomes immaterial.

VENDOR AND VENDEE—RIGHT OF FORMER TO RATIFY TRANSFER.—A vendee cannot escape from the obligation to pay notes given by him for the purchase price of real property on the ground that the conveyance to him was made by a person acting for the vendor without previous authority, if the vendor, after knowledge of such conveyance, ratifies it, and the vendee has taken and held possession for several years under the conveyance to him, which he claims was not authorized.

RESCISSIOn.—If a VENDOR INDUCES THE PURCHASE OF REAL PROPERTY BY REPRESENTING that he will do certain acts, and discontinues those acts, but the vendees remain in possession of the property, and make further payments thereon, ask extensions of time in which to make other payments, it is too late for them to rescind their contract of purchase.

Chapman and Hendrick, and Henry Bleecker, for the appellants.

Anderson, Fitzgerald, and Anderson, Anderson and Anderson, F. W. Sanborn, and Victor Montgomery, for the respondents.

PATERSON, J. On September 12, 1887, Culver, claiming to act under a power of attorney from Delano, sold and conveyed a tract of land owned by himself and Delano to Jacoby *et al.* By the terms of the agreement, the purchasers were to pay off a prior mortgage of five thousand dollars, and the sum of thirteen thousand dollars, six thousand dollars of which were paid in cash. Of the remaining seven thousand dollars, three thousand five hundred dollars were to be paid in one year, and the remainder in two years, with interest at ten per cent. Two notes were given by the purchasers for three thousand five hundred dollars each, one payable in one year and the other in two years, and payment thereof was secured by a mortgage on the lands sold.

Case No. 10111 is an action for the recovery of the amount due on these two notes, and to foreclose the mortgage given as security for the payment thereof. The answer in that case consists,—1. Of a general denial; 2. Allegations that Delano and Culver never had title to the lands, or any portion of the same, and as soon as they discovered this fact, and before the commencement of this action, they rescinded the contract, and offered to restore to the plaintiff and Culver everything of value they had received under the contract; 3. That the defendants were induced to enter into the agreement by false and fraudulent representations (which are specifically set

forth), and that within a reasonable time after they discovered the facts, the defendants rescinded the contract, and offered to restore to plaintiff and Culver everything of value they had received under the contract; 4. That the defendants were induced to enter into the agreement by reason of the promise of plaintiff and Culver that said Culver would immediately "commence to erect five cottages on the tract of land known as the Culver Hotel tract, being lands adjoining the lands above mentioned," water and light the streets, and keep them watered and lighted, open and maintain a hotel on said hotel tract, etc.; that they have kept and performed all the conditions on their part, but none of the promises made by plaintiff and Culver have been fulfilled, and by reason thereof the consideration for the note has wholly failed; that within a reasonable time after the non-fulfillment of the conditions of the contract they demanded the return of the notes, and offered to return to plaintiff and Culver everything of value they had received from them under the contract.

Case No. 10712 in an action brought by Jacoby *et al.*, the purchasers referred to, for an accounting of all moneys paid by the plaintiffs on account of the purchase-money of the lands, and for the delivery and cancellation of the notes and mortgages. The complaint consists of allegations essentially the same as those made in the answer above referred to.

The court, in its findings, negatived all of the allegations made by Jacoby *et al.*, and judgment in each case was rendered in favor of Delano, in accordance with his prayer.

It is claimed by appellants that there is no evidence to support the finding of the court that Delano is the owner and holder of the notes and mortgage. But the complaint alleged that "on or about the twenty-fourth day of September, 1887, the said C. Z. Culver transferred and assigned for a valuable consideration all his right, title, and interest in said two promissory notes to plaintiff, and plaintiff is now the holder and sole owner thereof," and there is no denial of this allegation in the answer. There is, it is true, a general denial, but as the complaint was verified, and the defendant made many specific denials, the general denial must be treated as having raised no issue. Furthermore, plaintiff and Culver are named in the notes as payees. Payment to either, therefore, with or without suit, will extinguish the debt: Civ. Code, sec. 1475; *Lyman v. Gedney*, 114 Ill. 388; 55 Am. Rep. 871; *Henry v. M. Pleasant*, 70 Mo. 500. Culver was made a party

defendant in the second action, and will be bound by the judgment.

Appellants contend that the power of attorney from Delano to Culver was wholly insufficient to authorize the latter to execute a deed. It reads as follows:—

“I do hereby appoint C. J. Culver my agent and attorney in fact, with full power and authority to sell my interest when he sells his own in that lot or parcel of land situate in the county of Los Angeles. [Here follows particular description of the property to be sold.] I hereby give my said agent and attorney as full power and authority to sell said premises as I myself have, and do ratify and confirm all that he may lawfully do in the premises.

“Given under my hand and seal this twenty-third day of July, 1887.

[SEAL]

“C. DELANO.”

Following the signature is a certificate of acknowledgment in these words:—

“State of Ohio, Knox County, ss.

“Personally appeared before me C. Delano, and acknowledged signing and sealing of this power of attorney to be his voluntary act and deed.

“Given under by hand and official seal this twenty-third day of July, A. D. 1887.

[SEAL]

“JOHN S. BRADDOCK, Notary Public.”

This power of attorney was recorded in the office of the city recorder of Los Angeles County, August 2, 1887. It is said that as the acknowledgment was insufficient to prove the power of attorney or entitle it to record, it was not constructive notice to anybody. We do not understand the intended force of this suggestion. If the power of attorney was otherwise valid, it was good as between the parties to the transaction, whether recorded or not.

There is an apparent conflict of authority on the question as to what is necessary in a power of attorney for the sale of land to authorize the attorney to execute and deliver a deed to the purchaser. Each case must be decided upon its own peculiar circumstances: *McNeil v. Shirley*, 33 Cal. 206; *Rutenberg v. Main*, 47 Cal. 220; *Hemstreet v. Burdick*, 90 Ill. 444. As between the parties to the transaction, it is proper to consider their situation at the time of the execution of the letter, and their intention is to be gathered from the words of

the instrument, and all the circumstances under which it was written and acted upon.

"The vendor may be unwilling to deal with a particular proposed purchaser on any terms. He may consider him pecuniarily unable to comply with the contract, even if the title prove satisfactory, and he may decline to bind himself to convey to such a purchaser at the end of the time necessary to examine the title, because he might thereby in the mean time lose an opportunity to sell to some other person who might desire to purchase, and in whose good faith and ability to pay he reposed entire confidence": *Duffy v. Hobson*, 40 Cal. 245; 6 Am. Rep. 617. So the general rule is, that a mere authority "to sell," in the absence of any other words or circumstances qualifying the language, would not confer upon the agent the power to determine these matters for his principal. There are some exceptions to the rule: 1 Am. & Eng. Ency. of Law, 360, and cases there cited.

In this case, Delano and Culver were joint owners of the property. Culver lived in this state, Delano in Ohio, and the latter had the utmost confidence in the former. The language of the letter is emphatic, and carries with it the conviction that Delano intended that Culver should do something more than merely find a purchaser for him. Culver was intending to sell and convey his interest in the land, and Delano evidently intended at the same time to dispose of and convey his own interest through Culver. Within a month after the sale, Culver visited Delano at Mt. Pleasant, Ohio, and there made a report of their joint transactions in land in California, including the transaction under consideration. Delano does not appear to have been at all surprised to find that Culver had taken the notes and mortgage, and must have known from this fact that he had given a deed to the purchasers. It is contended by the appellants that Delano denied that he had given Culver authority to act for him, but an examination of his testimony reveals the fact that he had repudiated merely the right of Culver to make any representations as to what would be done in or about the premises. He never repudiated his right to sell, nor has he ever expressed any dissatisfaction with the terms of the sale or the execution and delivery of the deed. His denial of the right of Culver to make the representations alleged becomes immaterial, in view of the finding of the court that the representations made by Culver were neither fraudulent nor false.

We find nothing in the authorities upon which appellants rely that is opposed to the views we have expressed.

But if it be conceded that the power of attorney was defective or insufficient to authorize a conveyance, the vendors, under the facts shown, would be estopped from claiming that Culver's acts were without authority. The latter claimed the right to convey, and acted upon such claim. Delano ratified his acts by approving the report which he made, by accepting the notes and mortgage, and by insisting upon payment of the balance of the purchase price: 2 Herman on Estoppel, secs. 792, 793; *Simson v. Eckstein*, 22 Cal. 595; *Borel v. Rollins*, 30 Cal. 413. Equitable estoppels must be mutual, and if the vendor cannot refuse to convey after receiving and accepting the benefit of the act done by the agent, it would be inequitable to permit the vendee, after taking and holding possession for several years, making payments and otherwise treating the contract as valid, to take advantage of the defect in the agent's original grant of authority. If the vendor cannot repudiate the ratified act of his agent after the property has increased in value, the vendee should not be permitted to escape from the effect of the act so ratified after the property has decreased in value. A similar question was passed upon in a recent and well-considered case, wherein Mr. Justice McFarland, expressing the views of the court, said: "The court does not find whether or not Meux signed the contract or was a party to it; but the evidence clearly shows that he ratified it as soon as his co-vendor informed him of it, and soon afterwards, when he came to Fresno, 'again ratified the sale between the parties, and talked with the purchasers about it.' Again, when the deferred payments became due, he asked the vendees for the money, and they, making no objection of any kind, simply asked for some delay until they could make arrangements to pay. They proposed at one time to give a mortgage, and then concluded not to do so. And finally Meux united with Glenn in executing and tendering a deed. This was a complete ratification, and he would have been estopped from making a defense for himself which plaintiff seeks to suggest for him."

There is no conflict between the decision in the case just referred to and the one rendered in *Salfield v. Sutter Co. Land etc. Co.*, 94 Cal. 546, and the facts in the latter case were entirely different from those shown by the record herein.

The contention that the court's finding that Culver made

no false or fraudulent representations is against the evidence cannot be sustained, unless we discredit and discard the testimony of Culver, and this we have no right to do. The credibility of the witness is always a matter for determination in the court below.

It is not clear that the alleged representations, if proved, would constitute a defense to the action: Kerr on Fraud and Mistake, 89; *Jefferson v. Hewitt*, 95 Cal. 535; but if conceded to be true, and sufficient to avoid the sale, appellants are not entitled to a rescission. The representations alleged were made in July, 1887. The deed was executed and delivered in September of the same year. Immediately thereafter, the purchasers went into possession of the land, surveyed and divided it into blocks and lots, laid out streets and alleys. Maps thereof were recorded in the office of the county recorder, and several lots were sold in accordance therewith. Within two weeks after the transaction was closed, Culver ceased sprinkling the streets, and within two months thereafter ceased lighting the streets. He made no attempt to proceed with the improvements he said he would make, and in May, 1888, he made an assignment for the benefit of his creditors, thus acknowledging his inability to carry out his promises. In March, 1888, the purchasers paid three thousand dollars on the five-thousand-dollar mortgage, and in September, 1888, they asked for an extension of three months' additional time in which to pay the three thousand-five-hundred-dollar notes. Whether this request was granted does not appear in the testimony, but we think the court was justified in finding it was, because it does appear that no action was brought to enforce payment of the same until March 27, 1889. No complaint whatever was made by the purchasers until January 22, 1889, when Mr. Thorne, manager for the syndicate purchasers, wrote to Mr. Delano, inquiring whether the promises made by Culver were to be fulfilled. The notice of rescission was not served upon Delano until March 26, 1889. By these acts and omissions the purchasers recognized the validity of the notes and mortgages in suit (*Grymes v. Sanders*, 93 U. S. 55), and waived their right of rescission of the contract: Civ. Code, sec. 1691; *Marston v. Simpson*, 54 Cal. 189; *Bailey v. Fox*, 78 Cal. 389; *Schiffer v. Diets*, 83 N. Y. 300.

The failure of Delano to execute a release of the mortgage, so far as it affected the lots sold, did not warrant a rescission

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of the contract. By the terms of the mortgage, the vendors were to "release any particular lot or lots of such subdivision from the lien of this mortgage, upon payment to them of such amount for each and every lot so to be released as is expressed by the quotient, taken in dollars, obtained by dividing the entire sum due upon said promissory notes at the date of executing such release by the entire number of lots into which said mortgaged premises shall have been so subdivided according to said map or plat so filed." Delano was not told into how many lots the tract had been divided, nor was any offer made to pay him at any place or time any sum of money whatever. The number of lots into which the tract was to be divided was a matter entirely within the discretion of the purchasers, and it was their duty to tender the amount due on account of the release requested. Furthermore, it appears in the record that the bank released the lots from the lien of the mortgage, and that Culver, acting for himself and as agent for Delano, did the same thing.

The judgments and the orders are affirmed.

DEEDS — ACKNOWLEDGMENT. — A deed is valid between the parties without attestation or acknowledgment: *Wood v. Olapka*, 13 N. Y. 509; 67 Am. Dec. 62. The acknowledgment is only necessary to entitle the deed to be admitted to record: *Westhafer v. Patterson*, 120 Ind. 459; 16 Am. St. Rep. 330.

POWERS OF ATTORNEY. — The power to convey is implied in the power to "sell" real estate, if such a construction is consistent with the general terms of the instrument conferring the power: *Valentine v. Piper*, 22 Pick. 85; 33 Am. Dec. 715; *Alexander v. Walter*, 8 Gill, 229; 50 Am. Dec. 638; *Nobleboro v. Clark*, 68 Me. 87; 28 Am. Rep. 22.

AGENCY. — RATIFICATION, EFFECT OF: See, generally, note to *Atlee v. Bartholomew*, 5 Am. St. Rep. 109-114.

VENDOR AND PURCHASER. — RIGHT OF VENDEE TO RESCIND: See note to *Richardson v. McKinson*, 12 Am. Dec. 312-314. To avoid a contract for the purchase of land on the ground of fraud on the part of the vendor, the vendee must repudiate the contract and demand its rescission immediately upon discovering the fraud; and if, after such discovery, he remains quietly in possession for a long time, he cannot afterwards avoid the contract: *Blen v. Bear River etc. Mining Co.*, 20 Cal. 602; 81 Am. Dec. 122. If the vendee deals with the property as his own, and endeavors to dispose of it, he will be deemed to have waived his right to rescind: *Marshall v. Gilmann*, 47 Minn. 131.

WARNOCK v. HARLOW.

[95 CALIFORNIA, 298.]

LANDLORD AND TENANT. — AN ACTION FOR RENT cannot be sustained unless the relation of landlord and tenant has existed between the plaintiff and the defendant.

IN PENDENTE. — THE HOLDER OF AN UNRECORDED DEED cannot be affected by a judgment in a suit brought by his grantor after the execution of the deed, though the notice of the pendency of the suit is filed and recorded before such deed. The holder of an unrecorded conveyance, made before the commencement of an action, cannot be regarded as a purchaser *pendente lite*.

UNRECORDED CONVEYANCES ARE VALID against all persons, except subsequent purchasers and mortgagees in good faith and for a valuable consideration.

UNRECORDED CONVEYANCES — SUBSEQUENT PURCHASERS, WHO ARE NOT. — One who brings and successfully maintains an action to have the defendant declared to hold property in trust, and to compel a conveyance thereof, is not a subsequent purchaser, and no title he may acquire by virtue of the judgment in such action, and a conveyance made pursuant thereto, can have precedence over an unrecorded conveyance made by the defendant before the suit was brought.

JUDGMENT IS CONCLUSIVE ONLY between the parties and their successors in interest by title subsequent to the commencement of the action.

TRUSTEE, PURCHASER FROM. — If a conveyance is made by one who, in an action begun after it was executed, is adjudged to have held the property in trust, the grantee is not bound to assume the burden of proving that he was a purchaser in good faith and for a valuable consideration, in a contest with the holder of title acquired under the judgment in such action. The grantee not being a party to the action, it could not affect him, nor establish against him that his grantor held the property in trust.

A. L. Hart, for the appellant.

Add. O. Hickson and John W. Armstrong, for the respondent Catlin.

Elwood Bruner and A. J. Bruner, for Warnock.

HAYNES, C. On May 4, 1881, W. W. Brison was the owner of the lands described in the complaint, and on that day conveyed the same to his wife, Carrie M. Brison. On September 15, 1886, W. W. Brison commenced an action against his wife, the object of which was to obtain a decree declaring that she held the title to said lands in trust for himself, and to compel a reconveyance, and at the same time filed a *lis pendens* in the recorder's office.

On November 22, 1888, a decree was entered in said cause, requiring Mrs. Brison to execute such conveyance within ten days, and in default thereof, directing the clerk of the court

to execute such deed in her name, and such deed was made and delivered by the clerk on December 5, 1888, and recorded on the same day.

On November 29, 1888, after the entry of said decree, and before the execution of the deed by the clerk, W. W. Brison conveyed the land mentioned to the defendant Catlin, one of the respondents herein.

On September 15, 1886, some four or five hours before the suit of *Brison v. Brison* was commenced, and before the *lis pendens* was filed, Mrs. Brison conveyed the same land to appellant, W. P. Harlow, but which deed was not recorded until August 15, 1887.

The plaintiff in this action, W. E. Warnock, was the lessee of the same land from Mrs. Brison from October 1, 1885, for one year, and again for a second year, ending October 1, 1887, and paid the rent to her. From October 1, 1887, up to October 1, 1890, Warnock was tenant of the same land under a lease from Harlow, and for the first year paid the rent to Harlow. The rent for the second and third years is the subject of this controversy.

The respondent Catlin, after the said deed from W. W. Brison was executed to him, notified plaintiff thereof and demanded the rent; whereupon the plaintiff commenced this action against Harlow and Catlin, setting out the claim and source of title to each, that each of the defendants claimed to be entitled to the rent due from him, and paid the money into court, and required that they interplead, and that the money be paid to whichever party the court should direct.

Defendant Catlin answered, admitting the facts alleged in the complaint, denied that Harlow was entitled to receive the rents, and alleged that he, Catlin, was entitled thereto.

Defendant Harlow, in his answer, among other allegations not necessary to be noticed at present, alleged that the title which he has, and had at the time he leased to the plaintiff, was derived by him under a deed from said Carrie M. Brison, dated September 15, 1886, but which was executed and delivered to him before the action of *Brison v. Brison* was commenced, and before the filing of the *lis pendens*, "and that at the time of the commencement of said action of *Brison v. Brison*, and at the time of the filing and recording of the said notice of the pendency of the action, he was the owner, in the possession, and entitled to the possession, of said land."

The cause was tried by the court, and findings and judgment

passed in favor of defendant Catlin, and defendant Harlow appealed upon the judgment roll.

Appellant contends that respondent Catlin, not being a party to the lease under which the rent accrued, cannot recover rent, as such, unless he has in some way succeeded to the legal title held by appellant at the time the lease was given, or that in some way the conventional relation of landlord and tenant is shown to exist between Catlin and Warnock.

It is undoubtedly true that Catlin could not maintain an action against Warnock for the rent, *eo nomine*, unless such relation existed: *Emerson v. Weeks*, 58 Cal. 439; *Ramires v. Murray*, 5 Cal. 222.

Whether he could recover the money voluntarily paid into court by the tenant as the rent stipulated in the lease executed by appellant without being required to establish by proof the existence of such relation, or whether, such relation not existing, he would be required to resort to an action to recover the value of the use and occupation of the premises if he were entitled thereto as between himself and appellant, is a different question.

Assuming that respondent Catlin is entitled to the value of the use and occupation of the premises, and that Warnock is as to him a trespasser, yet I see no reason why he may not avail himself of Warnock's admission that he owes the money to whichever of the claimants may be entitled to it, and if entitled, recover it, as against Harlow, even though the actual value of the use and occupation may be more or less than the amount deposited; for if appellant be not entitled to the money, it cannot concern him whether Catlin is receiving and Warnock paying more or less than the true value.

It is obvious, however, that the decisive point in the case lies beyond the question above considered, and must first be determined.

The deed made in 1881 by W. W. Brison to his wife undoubtedly vested in her the legal title to the land; and as between those parties, the judgment finally rendered in the case of *Brison v. Brison*, November 22, 1888, is conclusive of the fact that said deed, though purporting to convey an unqualified ownership and title, vested in Mrs. Brison the title, in trust for her husband.

It is contended by respondent Catlin that Harlow, the

grantee of Mrs. Brison, though the deed under which he claims was executed and delivered to him before suit was commenced against her, and before the notice of the pendency of the action was filed, is, nevertheless, bound by that judgment, for the reason that his deed was not recorded until after the *lis pendens* was filed and recorded; in other words, that the holder of a prior unrecorded deed is to be regarded as a purchaser *pendente lite*, and therefore bound by the judgment.

This question as thus presented is *res nova* in this state, and a full discussion of it would involve an examination of several provisions of the statutes and the construction heretofore given to each.

Certainly, this contention of counsel for respondent cannot be sustained upon any reasonable construction of section 409 of the Code of Civil Procedure, which provides for filing and recording a notice of the pendency of the action in the cases there mentioned. That section provides: "From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names."

The mere pendency of a suit does not, as at common law, charge the subsequent purchaser. A notice of *lis pendens* must appear of record: *Head v. Fordyce*, 17 Cal. 149. This statute does not give new rights to the plaintiff, but limits rights which he had before, by requiring for the purpose of giving constructive notice, not only a suit, but the filing of a notice of it: *Richardson v. White*, 18 Cal. 102. If, therefore, the filing of the *lis pendens* is the only constructive notice which can be given of the pendency of the suit, it is clear that the operation of the *lis pendens* as constructive notice cannot be made to depend upon the fact that the deed of a prior purchaser remained unrecorded, for that would be to import into the statute a term or condition not named in it.

Several cases are cited by counsel for respondent Catlin from the reports of other states in support of their contention, and among them the case of *Hoyt v. Jones*, 31 Wis. 389, which seems to have been decided under a *lis pendens* statute essentially the same as ours. While this case supports respondent's contention, I cannot approve the conclusion reached by the court, nor the reasoning upon which it is based, — reasoning which would be much more cogent if addressed to the ques-

tion as to what the law should be. It is a significant fact, however, that after the decision of *Hoyt v. Jones*, 31 Wis. 389, the Wisconsin statute under which that case was decided was amended so as to provide in terms that a party holding an unrecorded deed should be deemed a purchaser *pendente lite*.

The other cases cited by counsel for respondent upon this point were decided under statutes essentially different from ours, and upon provisions directly relating to the effect of a failure to record deeds. These cases, so far as appears necessary, will be noticed in another connection.

Respondent further contends that as against W. W. Brison (under whom respondent claims, and whose *lis pendens* was first recorded) the unrecorded deed from Mrs. Brison to appellant was void, and cites section 1217 of the Civil Code in support. This section is as follows: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." This section, counsel say, is the same as though it said: "An unrecorded instrument is invalid except as between the parties thereto," etc. If it were clear that section 1217 of the Civil Code means what counsel claims, it would not be necessary to make the paraphrase. If, however, counsel are right in their construction, *Smith v. Hodsdon*, 78 Me. 180, *Collingwood v. Brown*, 106 N. C. 362, and *Uiley v. Fes*, 33 Kan. 683, cited by them, are in point; otherwise they are not. The Maine section is: "No conveyance . . . is effectual against any person except the grantor, his heirs and devisees, and persons having actual notice thereof, unless the deed is recorded," etc. In North Carolina a deed only becomes effective by filing for record. And in neither of these states is notice of the pendency of an action required to be filed or recorded, and the Kansas statute is the same as that of Maine. Our code provisions touching the recording of deeds must be construed together. At common law, recording was not necessary to the validity of the deed, or to make it effective against all subsequent conveyances; and such is the law now, except so far as our recording acts have expressly, or by necessary implication, limited their effect and operation. The object of these recording acts is to give "constructive notice of the contents thereof to subsequent purchasers and mortgagees" (Civ. Code, sec. 1213), and to declare the effect of the failure to record a prior conveyance as against a subsequent purchaser or mortgagee of the same property whose conveyance is first recorded (Civ. Code, sec. 1214); and if

that section stood alone, a subsequent grantee whose deed was first recorded would have taken the title, even though he had actual notice of the prior unrecorded deed. To prevent this, or at least to place the matter beyond question, section 1217 of the Civil Code declared that "an unrecorded instrument is valid as between the parties thereto and those who have notice thereof." It will be seen that this section, at least as to the last clause, is a necessary qualification of section 1214, and must therefore be taken in connection with it; and it should also be noticed that the only persons as to whom the failure to record a deed makes it void are subsequent purchasers and mortgagees in good faith and for a valuable consideration, while the construction contended for by counsel would make it void as to all persons (except the parties and those who had notice), including heirs and devisees, and purchasers or grantees in bad faith and without consideration.

Nor could the filing of the *lis pendens*, as contended by counsel, operate as a prior recording of a subsequent conveyance, so as to make the deed executed by the clerk to Brison relate back to the commencement of the action, as against the deed to Harlow, which was executed before the suit was begun, and recorded before the deed made by the clerk to Brison was executed; for Brison was not a subsequent purchaser within the meaning of the statute. If he acquired title either under the decree or deed, it must have been upon other grounds. Nor was the *lis pendens* such an "instrument" as the statute contemplates. The word "conveyance," as used in sections 1213 and 1214 of the Civil Code, is defined by section 1215, and the word "instrument," as used in the recording acts, was construed in *Hoag v. Howard*, 55 Cal. 564, where it was held to mean "some written paper or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty," and that it did not include a writ of attachment.

It is further contended on behalf of respondent Catlin, that as Mrs. Brison held the land in trust, the beneficial estate being in her husband, that Harlow acquired no larger estate than she held, and that if he took any title under her conveyance, it was as trustee for W. W. Brison. Assuming that Mrs. Brison was a trustee for the benefit of her husband, that trust not appearing upon the deed which conveyed to her the legal title, it does not follow that her grantee did not take the property discharged of the trust: Civ. Code, secs. 856, 2243.

It is assumed and asserted by counsel for respondent Catlin, that Harlow must aver and prove that he was a purchaser in good faith and for a valuable consideration, and that unless he does so, he is a mere volunteer; and in support of this proposition section 2243 of the Civil Code is cited. That section provides: "Every one to whom property is transferred in violation of a trust holds the same as an involuntary trustee under such trust, unless he purchased it in good faith and for a valuable consideration."

If the appellant were bound by the judgment against his grantor in the case of *Brison v. Brison*, the burden would be upon him to show that he "purchased in good faith and paid a valuable consideration." But appellant was not a party to that proceeding, and is not bound by the judgment. As to him, it has not been adjudged that his grantor was a trustee. That judgment is conclusive only "between the parties and their successors in interest by title subsequent to the commencement of the action": Code Civ. Proc., sec. 1908, subd. 2; *Hall v. Boyd*, 60 Cal. 443. There is therefore no ground to justify the assertion that appellant was a volunteer, or not a purchaser in good faith, unless it appears that that question was litigated and adjudicated in this case, and that does not appear. The complaint of Warnock, the tenant, recites the ground upon which appellant and respondent Catlin respectively claimed to be entitled to the rents, and in this recital disclosed that appellant claimed under a deed from Mrs. Brison, but did not disclose or allege that it was made prior to the commencement of the action of *Brison v. Brison*, and as to respondent's claim, alleged that it was under a deed from Brison, executed after the judgment in his favor. There was no allegation in the complaint that appellant purchased with notice of the trust, or that he was not a purchaser in good faith and for a valuable consideration. Respondent Catlin filed his answer first, and admitted "the several averments of fact in said complaint contained," and made no other allegations of fact. He therefore stood directly upon the judgment, and the deed made in pursuance of it, and the argument of his counsel is directed almost wholly to the proposition that appellant was bound by that judgment, notwithstanding the finding of the court that appellant's deed was made and delivered before the commencement of the action, as alleged in his answer.

As we have seen, appellant claimed under a prior deed,

and that it was first recorded. The presumption was, that appellant acquired thereby the estate which his deed purported to convey, and he was in possession by his tenant.

If the deeds of the respective parties were put in evidence, without anything more, appellant's title must have prevailed, and hence the burden was upon respondent to allege and prove some fact that would qualify or invalidate appellant's title. For this purpose respondent relied upon the plaintiff's averment of the judgment, erroneously supposing that appellant was bound thereby; whilst appellant could safely stand upon his deed, unaffected by the judgment against his grantor, until the good faith of his purchase should be attacked by averment and proof. Inasmuch as the findings expressly show that appellant's deed was acknowledged and delivered between ten and eleven o'clock, A. M., on September 15, 1886, and that the suit of *Brison v. Brison* was commenced and the *lis pendens* filed about four o'clock, P. M., of the same day, and no fact being alleged or found which would invalidate appellant's deed, or show that he held the property in trust for respondent Catlin, the judgment is not sustained by the findings. If anything were needed to confirm the correctness of this conclusion, it will be found in the conclusion of law drawn by the court from the findings of fact, viz., "that the defendant Harlow is concluded herein by said decree in the action of *Brison v. Brison*."

Some other questions have been made in the very able and exhaustive briefs of counsel for each party, but which, in view of the conclusion reached, it is not necessary to consider.

I advise that the judgment be reversed, and a new trial ordered, with leave to the parties to amend their pleadings, if so advised.

BELCHER, C., and VANCLIEF, C., concurred.

For the reasons given in the foregoing opinion, the judgment is reversed, and a new trial ordered, with leave to the parties to amend their pleadings, if so advised.

DE HAVEN, J., SHARPSTEIN, J., McFARLAND, J.

LANDLORD AND TENANT. — An action for use and occupation does not lie, except upon an express or implied demise: *Hoffar v. Dement*, 5 Gill, 132; 46 Am. Dec. 628; that is, where the relation of landlord or tenant exists between the parties: *Bancroft v. Wardwell*, 13 Johns. 489; 7 Am. Dec. 396.

LIS PENDENS. — Title vests on the delivery of a deed to the purchaser,

and not from the date of its registration; hence a judgment against the vendor, rendered in a suit brought after he has parted with title, but before the registration of the deed, cannot affect the purchaser, who was not a party to the suit; nor can his title be affected by equities between the parties to such suit, to which he is not subject: *Masterson v. Little*, 75 Tex. 682. Rule of *lis pendens* does not apply to strangers whose rights existed before the suit was commenced: *Parts v. Jackson*, 11 Wend. 442; 25 Am. Dec. 656; *Jackson v. Dickenson*, 15 Johns. 309; 8 Am. Dec. 236.

UNRECORDED DEEDS, as between the parties, pass the estate immediately upon delivery; and upon being recorded, they relate back to the time of their delivery, unless the rights of *bona fide* purchasers have in the mean time attached: *McMechan v. Grifing*, 3 Pick. 149; 15 Am. Dec. 196; *Pray v. Pierce*, 7 Mass. 381; 5 Am. Dec. 59.

BONA FIDE PURCHASER, WHO IS NOT. — Judgment creditor is not a *bona fide* purchaser, within the meaning of the registry law, where the sole foundation of his right is his own judgment; and he cannot prevail against a purchaser in good faith holding under an unrecorded conveyance: *Shirk v. Thomas*, 121 Ind. 147; 16 Am. St. Rep. 381.

JUDGMENTS, CONCLUSIVENESS OF. — Parties and privies are alone bound by judgments; a party cannot be affected by a suit to which he is a stranger: *Whitney v. Higgins*, 10 Cal. 547; 70 Am. Dec. 748; *Voss v. Morton*, 4 Cosh. 27; 50 Am. Dec. 750; *Liscomb v. Postell*, 38 Miss. 476; 77 Am. Dec. 651; *Cameron v. Cameron*, 10 Smedes & M. 394; 48 Am. Dec. 759; *Brush v. Fowler*, 36 Ill. 53; 85 Am. Dec. 382; *Blue v. Blue*, 38 Ill. 9; 87 Am. Dec. 267; *Short v. Gahway*, 83 Ky. 501; 4 Am. St. Rep. 168. A privy to a judgment is one whose succession to the rights of property thereby affected occurred after the institution of the particular suit, and from a party thereto: *Orthwein v. Thomas*, 127 Ill. 554; 11 Am. St. Rep. 159.

UNRECORDED CONVEYANCES, EFFECT OF JUDGMENTS AGAINST HOLDERS OF. — Under the statutes in force in many of the states, actions may be brought to determine conflicting claims of title, and it has, perhaps generally, been supposed that when such actions include all the parties in possession of the property, as well as all parties having any claim thereto appearing of record, the final judgment must necessarily be conclusive therein, and justify an intending purchaser in taking a conveyance from the successful parties. This, however, is not true, if any one having title was not party to the suit, though his title did not appear of record, unless it be further true that a purchaser from another party, in whose name the title appears of record, may be regarded as an innocent purchaser for value, and therefore protected against claims existing, though not derived, from his immediate grantor after the commencement of the suit. The bringing of the action, and recording proper notice thereof, do not constitute any of the parties thereto purchasers or encumbrancers, and therefore there is difficulty in protecting them, under the language of most of the statutes regarding the registration of conveyances. On examining the question, we had already reached the same conclusion announced in the principal case, and had thus expressed it in section 201 of *Freeman on Judgments*: "A very serious question is, whether this rule is applicable to persons who have acquired a title or lien by virtue of a conveyance or mortgage which has not been filed for record, and of which the person invoking the aid of the law of *lis pendens* had no notice, actual nor constructive. The question is sometimes controlled by statutes, as where suits for partition, to foreclose liens, and the like, are commenced and con-

ducted under enactments declaring that persons whose interests do not appear of record need not be made parties, or that when a notice of the pendency of an action is filed the judgment shall bind persons whose conveyances are not then recorded: *Collingwood v. Brown*, 106 N. C. 362; *Lamont v. Cheshire*, 65 N. Y. 30. Generally, the statutes authorizing the registration of writings affecting the title to real property do not make them void while unregistered, but merely protect from their operation innocent purchasers or encumbrancers from the parties thereto, or some of them. If a suit results in the sale of property, so that some one becomes an innocent purchaser thereunder, he is doubtless protected from unrecorded writings of which he has no actual or constructive notice: *Freeman on Judgments*, sec. 366; *Freeman on Executions*, sec. 336; *Sprague v. White*, 73 Iowa, 670; but unless and until some one becomes such a purchaser, one whose title or lien antedates the suit, but is not of record, is not bound by the *lis pendens*. Hence if a suit is brought by A against B to quiet title to property, or to recover possession thereof, after B has conveyed to C, the latter cannot be bound by the judgment, when he is not a party to the action, because neither A nor any of his grantees can be regarded as purchasers or encumbrancers under either B or C, who are the parties to the unrecorded conveyance: *Smith v. Williams*, 44 Mich. 240; *Hammond v. Paxton*, 58 Mich. 393; *Voss v. Morton*, 4 Oush. 27; 50 Am. Dec. 750; *Hall v. Nelson*, 23 Barb. 88; *contra*, *Norton v. Birge*, 35 Conn. 250; *Smith v. Hod-don*, 78 Me. 180; but the latter case was decided under a statute declaring an unrecorded deed to be void, except as against the grantor and his heirs and devisees."

[IN BANK.]

EX PARTE SING LEE.

[96 CALIFORNIA, 354.]

MUNICIPAL CORPORATION HAS NO POWER TO MAKE THE RIGHT OF A PERSON TO FOLLOW HIS BUSINESS at any place he may select dependent upon the will of any number of citizens or property owners within its limits.

CONSTITUTIONAL LAW — LAUNDRIES, UNREASONABLE RESTRICTION OF RIGHT TO MAINTAIN. — A municipal corporation, though authorized by the state constitution to make and enforce such police, sanitary, and other regulations as are not in conflict with general laws, has no power to restrict the business of carrying on public laundries within its limits to two designated blocks of land, unless a permit is first obtained from its board of trustees, the ordinance prohibiting the granting of such permit without the written consent of a majority of the owners of real property within the block in which it is proposed to establish the business, and also within the four blocks adjacent thereto.

CONSTITUTIONAL LAW. — RIGHT OF THE OWNER OF PROPERTY TO USE IT in the prosecution of a lawful and necessary business cannot be made to rest upon the caprice of the majority, or of any number, of those owning property surrounding that which he desires to use.

F. C. Lusk, for the petitioner.

William H. Schooler, *contra*.

DE HAVEN, J. The petitioner was, at the date of the issuance and service of the writ of *habeas corpus* herein, restrained of his liberty by the marshal of the town of Chico, upon a charge of having violated section 1 of a certain ordinance of that town, "in that he did . . . unlawfully establish, maintain, and carry on the business of a public laundry . . . without having first obtained a written permit from the board of trustees of said town to establish, maintain, and carry on such public laundry."

It is claimed by the petitioner that the section of the ordinance which he is charged with violating is unconstitutional, and that therefore his imprisonment is illegal. For the purpose of passing upon the question thus presented, it is only necessary to consider sections 1 and 2 of the ordinance referred to. They are as follows:—

"Sec. 1. On and after the passage of this ordinance, it shall be unlawful for any person or persons to establish, maintain, or carry on the business of a public laundry or public wash-house, where clothes or other articles are cleansed for hire, within the corporate limits of the town of Chico, except in block No. twenty-four (24) and block No. ninety-six (96) of said town, according to the official map thereof on file in the recorder's office of Butte County, California, without first having obtained a written permit from the board of trustees to establish, maintain, or carry on such public laundry or public wash-house.

"Sec. 2. No permit shall be granted by said board of trustees, unless the person or persons so applying for the same shall have first obtained the written consent of a majority of the real property owners within the block in which it is proposed to establish, maintain, or carry on such public laundry or public wash-house, and also of the four blocks immediately surrounding the block in which it is proposed to establish, maintain, or carry on such public laundry or public wash-house."

1. It is provided by section 11 of article 11 of the constitution of this state that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws," and it is argued here, in behalf of respondent, that the ordinance in question is a police regulation, and therefore one which the town of Chico was authorized to enact by this section of the constitution. The power conferred upon cities

and towns by the section just quoted is undoubtedly a very broad and comprehensive one, and would sustain the enactment of any ordinance having a reasonable tendency to promote the health, the comfort, safety, and welfare of the inhabitants of the municipality, and which would not be in conflict with some general law of the state. But, broad as is this power, the ordinance before us cannot be considered as falling within the limits of its proper exercise.

The business of conducting a laundry is a lawful occupation, precisely as much so as is that of the carpenter, blacksmith, or merchant, and is not, of itself, and irrespective of the manner in which it is conducted, offensive or dangerous to the health of those living within its vicinity, and no municipal corporation has the power to make the right of a person to follow this business at any place he may select for that purpose dependent upon the will of any number of citizens or property owners within its limits, as is attempted in the ordinance under review.

A town or city may, when deemed necessary for the public health or safety, adopt reasonable regulations as to the manner in which such a business shall be conducted, and for this purpose may, in the exercise of its police power, impose reasonable restrictions as to the kind of building which may be used for such purposes, as, for instance, that it shall be of brick or stone in large and closely built cities, and that it shall have sufficient drainage, and may prescribe within reasonable limits the hours during which the work of the laundry shall be suspended: *Ex parte Moynier*, 65 Cal. 33; *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703. Regulations such as these were held in the cases above cited to be merely police regulations, which any municipality possessed of the ordinary powers of such corporations may exercise with a view to promote the health and safety of the community. But the ordinance which the petitioner here is charged with violating is not of this character, and the restrictions which it imposes upon the right to carry on a public laundry have no tendency to promote the public health, or in any way to secure the public comfort or safety. The sections of the ordinance above quoted bear no kind of relation to such objects, and do not attempt to regulate the business mentioned with the view of accomplishing such ends, but they commit the right to carry on such business at all, in all but two blocks of the town, to the unrestricted will and

caprice of a majority of the real property owners within the block upon which it is proposed to establish such laundry, and of the four blocks immediately surrounding such block. Such a condition imposed upon the right of a person to maintain a public laundry is not only an unauthorized interference with the inalienable right of such person to engage in a lawful occupation, but also with the right of the owner of property to devote it to a lawful purpose. The personal liberty of the citizen and his rights of property cannot be thus invaded under the disguise of a police regulation: *In the Matter of Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636.

In the case of *Yick Wo v. Hopkins*, 118 U. S. 373, the supreme court of the United States had before it the question of the validity of an ordinance of the city and county of San Francisco which made it unlawful for any person to "carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." This provision of the ordinance was in that case held void, as conferring upon the municipal authorities an arbitrary power to give or withhold consent to the carrying on of such business in buildings not made of brick or stone. In passing upon that question, the court, speaking by Mr. Justice Matthews, said: "It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes to which all similarly situated may conform. It allows, without restriction, the use for such purposes of buildings of brick or stone; but as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupants into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the building themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other, those from whom this consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living."

The ordinance now before us is not less illegal and arbitrary in its provisions, as it makes the right of the trustees to grant permission to carry on a laundry outside of the two blocks mentioned dependent entirely upon the consent of a

certain number of property owners, who are not accountable to any one for their action, and who are not required to give, or have any other reason for their refusal to give, such consent than their mere will. It is very clear to us that the right of an owner to use his property in the prosecution of a lawful business, and one that is recognized as necessary in all civilized communities, cannot be thus made to rest upon the caprice of a majority, or any number, of those owning property surrounding that which he desires to use.

An ordinance in all respects similar to this was held unconstitutional in *The Laundry Ordinance Case*, 7 Saw. 528, and it was there said by the court: "In the business of a laundry there is nothing objectionable that may not be urged against all occupations in the city and county. If, therefore, the supervisors can make its prosecution depend upon the approval of others in its neighborhood, they may require a similar approval for the prosecution of other business equally inoffensive. . . . Such a restriction upon the freedom of the pursuit of a lawful occupation is not authorized by any power vested in the board of supervisors, and it may be doubted whether it could be authorized by any legislative body under our form of government."

There is a wide distinction between the ordinance in this case and that which was upheld by this court in *Ex parte Christensen*, 85 Cal. 213. This ordinance deals with an occupation which is harmless in itself, and useful to the community, while the other was sustained as a police regulation of a business in which the citizen has no inherent right to engage, but which may be prohibited altogether, or only permitted under such conditions and restrictions as will, in the judgment of the law-making power, limit to the utmost the evils which often attend it.

Petitioner discharged.

MUNICIPAL CORPORATIONS — ORDINANCES RESTRICTING LAWFUL CONDUCT OR LAWFUL USE OF PROPERTY. — A municipal ordinance which, upon its face, restricts the right of dominion which the individual might otherwise exercise without question, not according to any uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of a municipality, is unconstitutional, as failing to furnish a uniform rule of action, and leaving the right of property subject to the despotic will of the city council, who may discriminate in favor of particular persons: *State v. Tenant*, 110 N. C. 609; 28 Am. St. Rep. 715, and note. A city ordinance which provides that "no parades or processions shall be allowed upon the streets" until a permit shall be obtained

from the police department, and which requires such permits to specify the route to be followed upon the streets, and prescribing a penalty for its violation, is unconstitutional and void: *Chicago v. Trotter*, 136 Ill. 430. As to the constitutionality of ordinances requiring the permission of a city council for the carrying on of certain occupations or the doing of certain things, see note to *Richmond v. Dudley*, 28 Am. St. Rep. 184.

[IN BANK.]

EX PARTE FELLOHLIN.

[96 CALIFORNIA, 300.]

CONSTITUTIONAL LAW — EMPLOYMENT OF WOMEN IN DRAM-SHOPS. — A municipal ordinance imposing license taxes upon places in which intoxicated liquors are sold in less quantities than one quart, to be drank or used upon the premises, and exacting a much greater fee for such license if any female is employed in any capacity whatever, is not unconstitutional, though the constitution of the state declares that no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession.

Nuttall and De Vries, for the petitioner.

Arthur L. Levinsky, contra.

BEATTY, C. J. The petitioner was convicted of violating an ordinance of the city of Stockton, and sentenced to pay a fine, or in default of payment, to be imprisoned in satisfaction thereof.

He claims that his imprisonment is unlawful, because the part of the ordinance which he is accused of violating is unreasonable, partial, unjust, and oppressive, and because it is in violation of section 18 of article 20 of the constitution, which reads as follows: "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession."

The clauses of the ordinance in question are the following: —

"Sec. 7. License is required, and a rate of license is fixed and charged, for conducting, maintaining, engaging in, or carrying on any business, trade, calling, or profession, game, entertainment, or show, in this section hereinafter mentioned or specified, as follows: . . .

"Subd. 15. For each saloon, bar, bar-room, dram-shop, tippling-house, or other place (except as in subdivision 16 of this section mentioned) where intoxicating liquors, wines, ales, or beer are bought or sold, or sold in less quantities than

one quart, or to be served, distributed, given away, drank, or used on the premises where sold, the sum of thirty dollars per quarter.

"Subd. 16. For each saloon, bar, bar-room, dram-shop, tippling-house, or place where intoxicating liquors, wines, ale, or beer are bought or sold in less quantities than one quart, or to be served, distributed, given away, drank, or used on the premises where sold, in which any female acts in the capacity of a bar-tender, waiter, actress, dancer, singer, solicitor of custom, or servant, or plays upon any musical instrument, or is employed in any capacity whatever, either with or without compensation, the sum of \$150 per month."

The offense charged against the petitioner, and of which he was convicted, was the employing of females, in a saloon where intoxicating liquors were sold in less quantities than one quart, without the necessary license.

There is nothing unfair, unreasonable, or arbitrary in the provisions of this ordinance. It is not open to any of the objections stated by Mr. Justice McKinstry to a similar ordinance of the city of San Francisco, in his opinion in the case of *Ex parte Maguire*, 57 Cal. 610; 40 Am. Rep. 125. If it is invalid for any reason, it is because the constitution means what it was held to mean in the opinion of Mr. Justice Thornton in the same case. The petitioner's argument, indeed, is substantially taken from that opinion, and the answer on the part of the city is in substance the same as the view expressed by Justice McKinstry as to the power remaining in the legislature to regulate the employment of women.

We are of the opinion that this view is a sound one, and that it subserves a wholesome public policy. The ordinance is a valid exercise of the police power vested in the municipal authorities.

The prisoner is remanded.

MUNICIPAL CORPORATIONS — CONSTITUTIONALITY OF ORDINANCES. — Any person may pursue any lawful calling in his own way, not encroaching on the rights of others. It is not competent to forbid any person or class of persons offering their services in a lawful business, or to subject others to penalties for employing them, unless the nature of the work is such as makes it unfit for certain persons, as women or infants: *Ex parte Kuback*, 85 Cal. 274; 20 Am. St. Rep. 226, and note. In *Crowley v. Christensen*, 137 U. S. 91, Justice Field said: "Not only may a license be exacted from the keeper of a saloon before a glass of his liquors can be disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be

opened. . . . The police power of the state is fully competent to regulate the business, — to mitigate its evils, or suppress it entirely. There is no inherent right in a citizen to sell intoxicating liquor by retail. . . . As it is a business attended with danger to the community, it may be entirely prohibited or permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority." See note to *Ward v. Mayor*, 35 Am. Rep. 702; also extended note to *Robinson v. Mayor*, 34 Am. Dec. 627, in which instances of the valid exercise of municipal police power are collected.

[IN BANK.]

EATON v. BROWN.

(96 CALIFORNIA, 371.)

CONSTITUTIONAL LAW — ELECTIONS — PARTY HEADINGS. — A statute prescribing the form and contents of ballots to be voted at an election, and providing that a cross shall be stamped opposite the name of every candidate intended to be voted for, except that the names of political parties which have filed certificates of nominations made by them may be printed at the head of all ballots, and a person intending to vote for all the candidates of any of such parties may stamp a cross opposite the name of such party, and shall then be deemed to have voted for all its nominees, is unconstitutional in so far as it permits the names of political parties to be so printed and their candidates to be so voted for, because it is an attempt to discriminate against classes of voters not belonging to any of such parties, by subjecting them to the alternative of disfranchisement, or of casting their votes upon more burdensome conditions than are imposed upon others no better entitled to the free and untrammelled exercise of the right of suffrage.

Henley and Swift, and John Currey, for the petitioner.

H. L. Gear and Charles J. Heggerty, for the registrar.

Dorn and Dorn, and Maxwell and McEnerney, for the board of election commissioners.

Thomas V. Cator, amicus curiæ, for the nominees of People's party.

BEATTY, C. J. At its last session, the legislature, by a series of amendments to the Political Code, ingrafted upon our election law the system of voting by means of what is popularly known as the reformed or Australian ballot. The main feature of the system is a uniform official ballot, printed and supplied by the proper public officers, containing the names of all candidates to be voted for, upon which the voter designates his choice by stamping a cross. In all cases this

may be done by stamping the cross opposite the name of each candidate for whom the elector desires to cast his vote. But by a clause at the end of section 1197 it is provided as follows: "At the head of each ballot shall be printed, in separate lines, the names of all political parties which have filed certificates of nomination of candidates in accordance with sections 1186 and 1187 of this code, thus: 'Regular Republican ticket' (straight). Opposite the name of each party, and on the same line therewith, there shall be a margin similar to that therein required to be left opposite the name of each candidate, in which the voter may place the mark in the manner specified in section 1205 of this code, if he desire to vote for all of the candidates of such party; but a ballot so marked shall not be counted if it be stamped in any other place, except to indicate a vote or votes upon a constitutional amendment or other question."

The petitioner in this case is one of the candidates of a party calling itself the Citizens' Non-Partisan party, which has nominated a list of candidates for county and local offices in the city and county of San Francisco. He claims that said party has complied with all the conditions entitling it to have printed, at the head of the municipal ballots to be used at the approaching election in the city and county of San Francisco, the words, "Citizens' Non-Partisan Ticket" as a party designation, by which it may be voted straight by stamping a cross opposite such heading. He has demanded of the defendants, who are respectively the registrar and the members of the board of election commissioners of the city and county of San Francisco, that they cause the ballots to be used at said election to be so printed, and they have refused. He therefore seeks, in this original proceeding, to compel the defendants, by *mandamus*, to comply with his demand.

The argument of counsel has been principally devoted to the question whether or not the party by which the petitioner was nominated has shown that its proceedings bring it within the terms or entitle it to the privilege conferred by the provision above quoted. But the conclusion at which we have arrived renders a decision of these questions entirely unnecessary. We are of the opinion that this provision of the law is unconstitutional and wholly void. It is an attempt to discriminate against classes of voters, and its effect, if allowed to be valid, would be to subject such classes to the alternative of partial

disfranchisement, or to the casting of their votes upon more burdensome conditions than are imposed upon others no better entitled under the fundamental law to the free and untrammelled exercise of the right of suffrage.

The vital importance of the question involved would justify an extended and elaborate discussion of the grounds of our conclusion, but the extreme necessity of a speedy decision, in order to afford a sufficient opportunity to print the ballots, and to inform the electors of the proper mode of expressing their choice, compels us to rest content with the briefest statement of our views.

It is a well-known fact, illustrated by the history of the party which the petitioner represents, that there are parties having merely local existence, — parties, that is to say, which, upon some local issue affecting a single county or a few counties, poll in such county or counties at least three per cent of the votes cast at a given election, or can secure the signatures of five per cent of the electors to a petition, but have no existence elsewhere in the state. These are other parties, perhaps, which at an election will cast three per cent of all the votes cast in the entire state, but in many counties will cast a smaller percentage of the votes. In the case first supposed, the party casting three per cent of the vote in a county at one election could, at the next election, upon any construction of the law, nominate by a convention a full county ticket, could certify it, and secure a ballot heading by party designation, but such designation would not apply to any candidate for a state or district office, such as presidential electors or members of Congress. The result of having a party designation at the head of the ticket would be, therefore, to disfranchise every voter who made use of it as to all state and district officers, or if he attempted to supplement his straight ticket by stamping his choice for individual candidates for such offices, he would be disfranchised altogether, for, under the law, his ballot could not be counted. The ticket heading in such case could do the voters of a party no possible good, but would simply be a lure by which they could be, and in many instances would be, entrapped into a loss of their votes. In the second case supposed, all the ballots used in the state would have a party heading, but in many of the counties the party would have no local ticket, and in all such counties the voter stamping the heading would vote for state offices only, and would be disfranchised as to all district and county offices, or if he at-

tempted specially to designate his choice for such offices, his vote would be wholly lost. Such being the results inevitably flowing from the operation of this provision of the law if allowed to be operative, it can readily be seen that it would be no benefit to any party to allow it a ticket heading unless it had a full state and local ticket, for no voter of the party could express his choice by stamping the party designation without partial or total disfranchisement. His supposed advantage would be but a delusion and a snare. Even in San Francisco, at the approaching election, if, as is said to be the case, the Non-Partisans have nominated candidates for the legislature, and if, according to the official opinion of the attorney-general, the names of such candidates are to be printed on the general or state ticket along with the names of candidates for Congress and for presidential electors, it would be just as much the duty of the defendants to put the party designation on the general as on the local ticket, and the necessary result would be, that every supporter of the party who should thus be misled into voting a straight ticket would lose his vote for member of Congress and for presidential electors. I imagine the supporters of the movement would scarcely desire the privilege of a party heading at such a price.

Upon these grounds, we hold that this provision destroys the just, and equal, and uniform operation which in an election law, of all others, is demanded, no less by the express terms of our fundamental law than by the genius and spirit of our institutions. It is therefore void and inoperative. There should be no party designations printed at the head of the tickets, because there can be no voting by stamping such designation. Voters can only express their choice by placing a stamp opposite the name of their candidate for each office, or by writing the name of a candidate in the blank space left therefor, or their answer to each question or proposition, or proposed amendment to the constitution, except only in case of presidential electors, who may, under the law, be voted for in groups by a single impression of the stamp. Since this is the only mode by which a voter can express his choice, the printing of a party designation at the head of the ticket could do no good, but only harm, by misleading some voters and causing them to lose their votes. The officers charged with the preparation of the official ballots should therefore be careful to omit the printing of such headings, and the voters should be thoroughly instructed to express their choice in the

manner herein indicated. It will be understood, of course, that we do not hold the new law unconstitutional except as to the single provision under discussion. In other respects, so far as we are at present advised, it may be fully carried out.

The writ of mandate is denied.

GAROUTTE, J. (concurring). It is very apparent from the reading of section 1197 of the act under consideration, in connection with the sections to which it refers, that in both spirit and letter it was intended that only parties polling three per cent of the entire vote cast at the last general election should have a heading upon the ticket. Such being the fact, to my mind the law is clearly unconstitutional in this, that it discriminates in favor of certain parties, and is therefore lacking in that uniformity of operation demanded by the constitution of this state.

I concur in the judgment.

ELECTIONS—PARTY HEADINGS.—The clause in the New Jersey election act of 1890 which provides that only those parties casting a certain percentage of the vote at the last election, and those parties presenting petitions signed by a certain number of voters, shall be entitled to official ballots, is a valid regulation to restrain the number of ballots to be printed within reasonable limits: *State v. Black*, Sup. Ct. N. J., June 2, 1892.

ELECTIONS—POWER OF LEGISLATURE TO REGULATE.—The legislature has the power to regulate elections, so long as it merely regulates the exercise of the elective franchise, and does not deny it, either directly, or by making its exercise so difficult as to amount to a denial: *De Waë v. Bartley*, 146 Pa. St. 529; 23 Am. St. Rep. 814, and note. Election laws must not be so unreasonable or restrictive as to exclude a large number of voters, without fault on their part: *Attorney-General v. Common Council*, 78 Mich. 545; 18 Am. St. Rep. 458, and note.

MILLER v. MILLER.

[96 CALIFORNIA, 376.]

A TAX DEED CREATES NO PRESUMPTION that the facts upon which it is based, or which are recited therein, had any existence, in the absence of a statute providing the effect which shall be given it in evidence.

TAX SALES—NOTICE TO REDEEM, NECESSITY OF EXTRINSIC PROOF OF.—

If a statute providing for the collection of taxes declares that a tax deed shall be *prima facie* evidence of certain designated facts, and conclusive evidence of all others, is, some years after its enactment, amended so as to require the purchaser to give notice of the expiration of the time for redemption, and that no deed shall be issued unless an affidavit, showing the giving of such notice, has been filed with the officer who made the sale, a deed by such officer is neither conclusive nor *prima facie* evi-

dence that such notice was given or affidavit filed, and must be disregarded, unless the person claiming under it proves that the affidavit was filed, for, until filed, the officer is without authority to execute a conveyance.

Charles F. Burton and A. C. Freeman, for the appellants.

W. A. S. Nicholson, for the respondents.

GAROUTTE, J. This is an action to quiet title, and an appeal is before us from the judgment, upon a bill of exceptions. Appellants introduced their tax deed in evidence, and rested, insisting that such deed established a *prima facie* title in them. We are unable to see that respondents' evidence was material to the case in any degree, and consequently we have nothing before us for consideration upon the question of title, save the tax deed of appellants. In viewing a tax deed from a common-law stand-point, the author of Blackwell on Tax Titles, at section 845, says: "This deed, according to the principles of the common law, is simply a link in the chain of the grantee's title. It does not, *ipso facto*, transfer the title of the owner, as in grants from the government, or in deeds between man and man. The operative character of it depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises upon the mere production of the deed that the facts upon which it is based had any existence." Such being the *status* of a tax deed at the common law, it is apparent that whatever dignity and value is attached to this deed as evidence of title is granted it by the statutory provisions of this state.

Section 3786 of the Political Code declares that the matters recited in the certificate of sale must be recited in the deed, and that such deed, duly acknowledged or proved, is primary evidence (*prima facie*) of certain matters and proceedings, specially naming them. Section 3787 provides that "such deed, duly acknowledged or proved, is (except as against actual fraud) conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed."

These provisions of the statute are plain and explicit, and in the absence of other and additional legislation, there would seem to be no question but that the production of a tax deed in evidence established a *prima facie* title. But several years subsequent to the foregoing legislation, a statute was enacted,

providing that the purchaser of property sold for delinquent taxes, or his assignee, must, thirty days previous to the expiration of the time for redemption, or thirty days before he applies for a deed, serve a notice upon the owner, stating certain matters, and further providing that the owner of the property shall have the right of redemption indefinitely until such notice shall have been given, etc. It is now insisted by respondents that the service of this notice is a condition precedent to the execution of the deed, and appellants having failed to prove such service, the deed was issued without authority, and therefore passed no title. An enactment similar in principle to the one under investigation is found in the statutes of New York, and also in the constitution of Illinois, and it has been uniformly held in those states that, in the absence of such notice, the deed was no evidence of title: *Holbrook v. Fellows*, 38 Ill. 440; *Wilson v. McKenna*, 52 Ill. 43; *Williams v. Underhill*, 58 Ill. 137; Blackwell on Tax Titles, sec. 699. The service of this notice is not one of those matters established *prima facie* by the deed under section 3786, *supra*, but it is insisted that under section 3787, *supra*, the deed, *ipso facto*, is made conclusive evidence of such service. If the authority of the officer to make the deed depends upon the service of a certain notice, it is very questionable whether the legislature has the power to declare that the deed shall be conclusive evidence that such notice was served, but we do not find it necessary to enter into a discussion of that question.

As already suggested, this enactment of the legislature, requiring notice to be served, etc., is of much more recent date than section 3787 of the Political Code, and it is very apparent, upon an inspection of these provisions, that the legislature never intended that it should come within the purview of that section. It certainly should not be held by this court to be embraced within the rules of evidence there provided, in the absence of an express declaration to that effect, for the section is severe and rigid in its operation. The words "conclusive evidence of the regularity of all other proceedings," as used in the section, refer, and were intended by the framers of the provision to refer, to the acts and proceedings required to be done and had at the hands of the public officials intrusted with the various steps leading up to the execution of a tax deed, and not, as in this case, to something required to be done by the applicant for the deed.

This is the construction placed upon a very similar provision by the supreme court of Iowa, and is undoubtedly the true one: "But it is said that the same section provides that the deed shall be conclusive evidence 'that all things whatsoever required by law to make a good and valid sale and to vest the title in the purchaser were done, except in regard to the points named in this section, wherein the deed shall be presumptive evidence only,' and that the deed is not made presumptive evidence of the notice of expiration of the time of redemption, and as that is necessary to vest title in the purchaser, the deed must, under the provision, be regarded as conclusive evidence of it. This provision is found in subdivision 3 of the section in question, which purports to treat of the prerequisites to be complied with by the officers having any part in the transaction relating to or affecting the title conveyed. We think it does not extend further. The giving of notice of the expiration of the time of redemption is something to be done by the holder of the tax certificate. The statute went very far in making the deed conclusive evidence that the prerequisites to be complied with by the officers had been complied with; yet the officers were elected for the purpose of doing the things constituting the prerequisites, and are wholly disinterested. We cannot think that the statute designed to allow the holder of the tax deed to rely upon it as conclusive evidence of the things to be done by himself. The effect of the statute requiring notice to be given of the expiration of the time of redemption is to lull property owners into security. If a tax deed is conclusive evidence of notice, where there is no notice, the provision constitutes a most dangerous trap, instead of a protection to property owners": *Reed v. Thompson*, 56 Iowa, 455; approved in *Wilson v. Crafts*, 56 Iowa, 450.

The authorities in this state, indirectly at least, hold that the tax deed is not conclusive evidence as to these matters. In *Landregan v. Peppin*, 86 Cal. 126, the deed was declared void because the recitals upon this question of notice therein contained showed that the law had not been followed in that regard. Now, if the deed, *ipso facto*, was conclusive evidence that the proper notice was given, any recitals therein showing to the contrary were of no avail; for if conclusive, the matter was foreclosed from investigation, and it follows that the court, in order to give weight to these recitals of the deed, necessarily held that the statute did not conclude and bar an investigation

as to the merits of the notice. In *Hughes v. Cannedy*, 92 Cal. 336, the deed was declared void because the notice posted upon the land was fatally defective. If the deed was conclusive as to the sufficiency of the notice, this decision of the court could not be supported. It is also intimated in *Rollins v. Wright*, 98 Cal. 399, that section 3787 of the Political Code has no reference to this matter.

Let the judgment be affirmed.

TAX DEED — EFFECT OF RECITALS IN. — Recitals in a tax deed of compliance with statutory requirements are not even *prima facie* evidence of such compliance: *Brown v. Wright*, 17 Vt. 97; 42 Am. Dec. 481, and note; *Downer v. Tarbell*, 61 Vt. 530; *Jackson v. Shepherd*, 7 Cow. 88; 17 Am. Dec. 502, and extended note; unless made so by statute; but the burden is on the party claiming under such deed to prove, by other evidence, full compliance with the requirements of the statute: *Worthing v. Webster*, 45 Me. 270; 71 Am. Dec. 543, and note; *Pelt v. Ross*, 25 Md. 153; 89 Am. Dec. 773, and note. A tax deed only raises a presumption that the property was assessed as required by law; and this presumption may be rebutted by the recitals in the certificate showing an illegal assessment: *De Friens v. Quint*, 94 Cal. 653; 28 Am. St. Rep. 151. A tax deed, regular upon its face, is *prima facie* evidence of the regularity of the proceedings, and the burden of proof is on the party attacking the deed: *Washington v. Hoep*, 43 Kan. 324; 19 Am. St. Rep. 141, and note. See note to *People v. Turner*, 15 Am. St. Rep. 508. Where the statute makes a tax deed presumptive evidence of the regularity of prior proceedings, the burden of showing irregularities is upon the owner, in an action by the holder of the deed for the possession, and to quiet title: *Hard v. Brimer*, 3 Wash. 1; 28 Am. St. Rep. 17, and note; but a tax deed cannot be declared by statute to be conclusive as to matters essential to jurisdiction: *Magular v. Henry*, 84 Ky. 1; 4 Am. St. Rep. 182.

There can be no doubt that the decision in the principal case declares the law as it ought to be; for if notices of the expiration of the time to redeem are not required to be preserved and produced in evidence, it is clear that the statute accomplishes no useful purpose in declaring that they shall be given, and prescribing their contents. For after the tax deed has been procured, the notice, if not what it should be, is too likely to disappear. On the other hand, it may be said with equal force and truth that the notice and affidavit of its service, when correct, are equally likely to be lost or destroyed. It is to be regretted that the statute did not require the evidence of the service of the notice to be recorded in some public record, so that means should exist, without resorting to extrinsic and parol evidence, of determining whether the deed constitutes title, *prima facie*. The declaration of the Political Code of California that tax deeds shall be conclusive evidence of the regularity of all proceedings, except as to certain enumerated matters, of which the giving of the notice is not one, is so clear and stringent that, had it been our duty to decide, we could not have escaped it. We are, however, as we have already indicated, glad that the court found means of escape satisfactory to it, — a conclusive presumption being, in our judgment, a thing of evil, and in no circumstances less to be tolerated than when invoked to deprive a citizen of rights of property by establishing against him that which probably did not occur.

[IN BANK.]

EDWARDS v. ROLLEY.

[98 CALIFORNIA, 408.]

A PATENT FOR LANDS MAY BE SHOWN TO BE VOID, whether in a collateral proceeding or not, by proving that the land department had no jurisdiction to dispose of the land described in the patent. The person thus attacking the patent need not connect himself in any way with the original source of title.

A STATE PATENT TO LAND WHICH HAD AT ONE TIME BEEN THE BED OF A RIVER, and which the officers of the state had therefore no authority to sell or patent, is void, and may, on that ground, be successfully resisted by one in possession without title of any character.

J. D. H. Chamberlin and Ernest Sevier, for the appellant.

Horace L. Smith, for the respondent.

TEMPLE, C. Plaintiff appeals from the judgment, upon the judgment roll alone.

The action is brought to quiet title, and, the defendant being in possession, is therefore virtually an action to recover possession, sometimes called an action of ejectment.

The defendant denied plaintiff's title, pleaded a former judgment as a bar, set up title in himself, and also claimed that the plaintiff's right of action was barred by the statute of limitations.

The action was tried without a jury, and the findings seem to state the facts quite fully.

The court found that neither plaintiff nor defendant had title to the demanded premises, and that plaintiff's right was not barred by the judgment pleaded, or by the statute of limitations, and defendant had judgment.

The findings show that on the 28th of September, 1850, and prior thereto, the demanded premises were in the bed of Eel River, a navigable stream; that the land in that township was public land of the United States, and was surveyed by the land department by meandering both banks of the river, thus excluding the bed of the river from the survey.

Defendant was the owner of a tract of land purchased from the state as lieu land, the application to purchase which was made November 22, 1858, at which time Eel River bounded it on the south and west, the land described in the complaint then being the bed of the stream bordering upon these lands. During the winter of 1861-62, the river suddenly changed its course, forming a new channel, and the water ceased to flow

in the old channel. Each succeeding freshet brought down sediment, which filled up somewhat the original channel, forming the land in controversy.

One John L. Pixley made application to purchase these lands from the state as swamp and overflowed lands, June 14, 1886, upon which application a patent was issued October 17, 1888. Under this patent plaintiff claims title.

The land in controversy, then, was the bed of a navigable stream until 1861. It was not acquired from the United States as swamp and overflowed land under the act of September 28, 1850. Many sections of the Political Code show plainly that no other lands are included under the designation "swamp and overflowed" in the statutes authorizing the sale of state lands. This land was not swamp and overflowed land within the meaning of those laws. Nor is there any other statute authorizing the sale of land of this character by the state officers.

It is said, however, that, admitting that the patent was issued in a case not authorized, still it is *prima facie* valid, and raises a presumption that the land had been properly segregated and listed to the state as swamp and overflowed land, and that all necessary steps had been taken to authorize the issuance of the patent: *Easton v. O'Reilly*, 63 Cal. 309.

It is further claimed that the defendant cannot attack the patent, unless he connects himself in same way with the original source of title. This last proposition unquestionably finds some support among the earlier decisions of this court, — particularly in *Doll v. Meador*, 16 Cal. 295, in which the proposition is broadly asserted. On this point, however, that case has not been followed in the later cases. In *Cucamonga Fruit Land Co. v. Moir*, 83 Cal. 101, the plaintiff claimed under a patent from the United States, and also a certificate of purchase from the state. The defendant had made application to purchase from the state, but it was contended that his application was void, because the land at the time was held adversely by another. This point was not deemed material, as the court found that plaintiff's patent and certificate were both issued without authority of law, and concluded as follows: "Each document was issued without authority of law, and is void against defendant, conceding that he showed no title except naked possession."

Some members of the court doubted whether it was a proper case in which to apply this principle, but so far as it holds

that a patent may always be shown to be void by evidence that it was issued in a case not authorized by law, it is in exact accord with the cases in the federal courts.

In *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, the true rule is declared in an opinion written by Judge Field. He says: "On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others."

And in *Steel v. St. Louis Smelting Co.*, 106 U. S. 447, after declaring the conclusiveness of the patent as to all matters which the department officers were required to pass upon, the same judge says: "It need hardly be said that we are here speaking of a patent issued in a case where the land department had jurisdiction to act, the lands forming part of the public domain, and the law having provided for their sale. If they never were the property of the United States, or if no legislation authorized their sale, or if they had been previously disposed of or reserved from sale, the patent would be inoperative to pass the title, and objection to it could be taken on these grounds at any time and in any form of action."

Many other cases in the supreme court of the United States are to the same effect.

I think, therefore, the judgment should be affirmed.

HAYNES, C., and VANOLIEF, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

McFARLAND, J., GAROUTTE, J., HARRISON, J., SHARPSTEIN, J., DE HAVEN, J.

PUBLIC LANDS—RIGHT TO ATTACK PATENTS.—A state patent, purporting to convey title, which is void upon its face, as where the state had no authority to convey, may be collaterally attacked in an action of ejectment: *Winter v. Jones*, 10 Ga. 190; 54 Am. Dec. 379. A *bona fide* pre-emptioner of public lands under the laws of the United States may attack collaterally a patent for the same land granted by the state by virtue of a selection of the land made by the state while he was in possession, in an action of ejectment against him by the state patentee, for the state had no title to the land: *Terry v. Meyerle*, 24 Cal. 609; 85 Am. Dec. 84, and note, in which the cases are collected discussing the impeachment of patents of public lands; also extended note to *Stark v. Mather*, 12 Am. Dec. 564, on the same subject. A

grant of lands not subject to grant is void, and can be attacked collaterally: *Brown v. Brown*, 103 N. C. 213. A state's patent of lands passes its title, but does not establish that it had title: *Musser v. McRea*, 38 Minn. 409. A patent which includes both vacant and already appropriated lands without locating the latter cannot be sustained: *Roberts v. Davidson*, 83 Ky. 279. A patent is void which was issued from the government to land which had previously been appropriated by the government and reserved from entry: *Doe v. Watts*, 7 Smedes & M. 363; 45 Am. Dec. 308, and note. The decision in the principal case, in so far as it permitted a patent to be attacked by extrinsic evidence in an action at law by one not in privity with the state, is of doubtful propriety, and apparently in conflict with *New York etc. R. R. Co. v. Aldridge*, 135 N. Y. 83.

FISH v. MCCARTHY.

[96 CALIFORNIA, 424.]

MECHANIC'S LIEN CANNOT EXIST EXCEPT WHERE THERE WAS A VALID CONTRACT for the doing of work or the furnishing of materials.

MECHANIC'S LIEN CANNOT BE ENFORCED AGAINST THE PROPERTY OF MINORS, where the contract under which the work was done or materials furnished was entered into on their behalf by their guardian without first obtaining an order of court authorizing him so to do.

Ash and Mathews, for the appellant.

Stafford and Stafford, for the respondent.

VANCLIEF, C. Action to enforce a mechanic's lien. The court sustained a general demurrer to the complaint, and plaintiff declining to amend, judgment passed for defendant.

Plaintiff appeals from the judgment on the judgment roll, and contends that his complaint was sufficient.

The complaint shows that the defendant, Mary McCarthy, in her character of guardian of the persons and estates of Mary, Joseph, and Patrick Powers, minors, employed the plaintiff to repair a certain building, the property of her wards; that plaintiff repaired the building and furnished all materials necessary for that purpose; that the materials and labor were reasonably worth \$120; and that he regularly filed with the recorder his claim and notice of lien.

The wards are also made defendants, but the guardian is sued only in her official capacity.

I think the following opinion of the learned judge of the trial court expresses the law of the case, and should be adopted: "This is an action to enforce a mechanic's lien. The work performed, materials furnished, for the value of which the lien is sought to be enforced, was performed, as per notice, for

the defendant, Mary McCarthy, guardian of the persons and estates of certain minors, who are also joined as parties defendant. Assuming that the allegation in question is equivalent to an averment that the defendant, McCarthy, as guardian of the minor defendants, and on their behalf, made the contract in question, it seems clear that the defendant, as such guardian, could not subject the estate and property of her wards to a lien, such as is here sought to be enforced, without first obtaining an order of court authorizing her to do so. The supreme court of this state, in *Guy v. Du Uprey*, 16 Cal. 196, 76 Am. Dec. 518, have directly so held. And the same rule is maintained by other courts: See Phillips on Mechanics' Liens, sec. 111; also *Hunt v. Maldonado*, 89 Cal. 636. As the mechanic's lien arises from work done and materials furnished under an obligatory contract, if the contract be not binding, the lien necessarily fails. An infant is not bound by his contract, except in certain cases, in which the erection of a building is not included." See also Phillips on Mechanics' Liens, sec. 108; Schouler on Domestic Relations, sec. 351.

I think the judgment should be affirmed.

TEMPLE, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

HARRISON, J., PATERSON, J., GAROUTTE, J.

Hearing in Bank denied.

MECHANIC'S LIEN — NECESSITY FOR VALID CONTRACT. — Mechanics and material-men are bound to ascertain whether the party with whom the contract is made is a minor or a person otherwise incapacitated; for if the contract is made with such person, it is not binding, and the lien of the contractor will fail: *McCarty v. Carter*, 49 Ill. 53; 95 Am. Dec. 572, and note; *Rogers v. Phillips*, 8 Ark. 366; 47 Am. Dec. 727, and note. A mechanic's lien cannot be enforced, when the contract under which it arises is made with another than the ostensible owner of the property at the time, or without his consent or authority: *Galbreath v. Davidson*, 25 Ark. 490; 99 Am. Dec. 233, and note; *Flannery v. Rohmayer*, 46 Conn. 558; 33 Am. Rep. 36, and note; *Monroe v. West*, 12 Iowa, 119; 79 Am. Dec. 524, and note; *Dunning v. Thomas*, 10 Col. 84. A mechanic's lien cannot be enforced against the property of an infant, because an infant cannot make a valid contract, and the lien implies one: *Alcey v. Reed*, 115 Ind. 148; 7 Am. St. Rep. 418; and on this point, see note to *Craig v. Van Beiber*, 18 Am. St. Rep. 592. As to who has such ownership in or relation to property that he can bind it by a mechanic's lien, see extended note to *Loonie v. Hogan*, 61 Am. Dec. 689.

MECHANIC'S LIEN. — POWER OF GUARDIAN TO BIND WARD'S PROPERTY BY MECHANIC'S LIEN: See *Guy v. Du Uprey*, 16 Cal. 195; 76 Am. Dec. 518.

CURRIER v. NELSON.

[96 CALIFORNIA, 505.]

DEED — BOUNDARIES — NORTH. — If land intended to be conveyed is described in a deed as commencing at a point on the northwesterly line of H. Street, distant 125 feet north of the northeasterly line of Fourth Street, and running thence northeasterly along said northwesterly line of H. Street 25 feet, and extending back from H. Street 75 feet, the word "north" must be construed as meaning due north, and the place of commencement must be ascertained by finding a point on the northwesterly line of H. Street, which is 125 feet due north from a point on Fourth Street, though such point is less than 125 feet from the corner of H. and Fourth streets.

Theodore H. Hittell, for the appellant.

Thomas F. Barry, for the respondents.

DE HAVEN, J. This is an action to recover possession of a certain lot in San Francisco, which is described in the complaint as "commencing at a point in the northwesterly line of Harrison Street, distant one hundred and twenty-five feet northeasterly from the northerly corner of Harrison and Fourth streets, and running thence northeasterly along said northeasterly line of Harrison Street twenty-five feet," and extending back from said street a distance of seventy-five feet. The court below gave judgment for the defendants, and the plaintiff appeals.

It appears from the record that one Jones was, on September 17, 1879, the owner and in possession of the lot in controversy, and both the plaintiff and defendant Schmalzlen claim to have succeeded to this title. The defendant Schmalzlen claims under a deed executed by Jones on September 17, 1879, and in which the lot conveyed is described as "commencing at a point on the northwesterly line of Harrison Street, distant one hundred and twenty-five feet north of the northeasterly line of Fourth Street, and running thence northeasterly along said northwesterly line of Harrison Street twenty-five feet," and extending back from Harrison Street a distance of seventy-five feet.

The plaintiff's claim of title is based upon a later quitclaim deed executed by Jones, and in which the land conveyed is described as in the complaint.

It will be seen from the foregoing statement that the only matter to be decided upon this appeal is, whether the deed of September 17, 1879, under which defendant Schmalzlen

claims, describes the land in controversy, and whether that deed does so describe it or not depends entirely upon the meaning of the word "north" as used in its first descriptive call. The first call in the deed referred to is for a point in the northwesterly line of Harrison Street one hundred and twenty-five feet north of the northeasterly line of Fourth Street. The court below found as facts: "10. That Harrison Street, in said city and county, runs in a northeasterly and southwesterly direction, and Fourth Street, in said city and county, runs at right angles to it, in a northwesterly and southeasterly direction; that the only point in the northwesterly line of said Harrison Street which is one hundred and twenty-five feet due north from the northeasterly line of said Fourth Street is a point on said northwesterly line of Harrison Street eighty-eight feet four and three eighths inches northeasterly on said line of Harrison Street from the north corner of said Harrison and Fourth streets, and thirty-six feet seven and five eighths inches southwesterly on said line of Harrison Street from the point of commencement of the real estate described in said complaint. 11. That a line drawn due south from the point of commencement of the real estate described in the complaint does not strike the northeasterly line of said Fourth Street in a less distance than one hundred and seventy-five feet due south from said point of commencement."

In view of these facts, it is clear that if the word "north," as used in the first descriptive call of defendants' deed, is to be construed as meaning due north, then the land in controversy was not conveyed by that deed, and the judgment in favor of defendants must be reversed. There is no doubt that the word "north" may be controlled or qualified in its meaning by other words of description used in connection with it. If, for instance, the deed here had described the lot as commencing at a point on the northwesterly line of Harrison Street one hundred and twenty-five feet north of the north corner of Harrison and Fourth streets, there would then have been a necessity to construe the word "north," as thus used to describe the course of the line between the two points named, as meaning "northeasterly," in order to harmonize with the points given for the beginning and ending of such line; but in the case before us there is no room for construction, and the court would not be warranted in giving to the word "north," in the call referred to, any other than its ordinary meaning, as there is nothing whatever in the deed to

indicate or suggest that it was used in any other sense. The word "north," unless qualified or controlled by other words, means due north, and that is its meaning in the deed under consideration. "The term 'northerly,' in a grant, where there is no object to direct its inclination to the east or west, must be construed to mean 'north'": *Brandt v. Ogden*, 1 Johns. 156. See also *Fratt v. Woodward*, 82 Cal. 220; 91 Am. Dec. 573; *Irwin v. Towne*, 42 Cal. 334.

It follows from the views we have expressed that the deed under which defendant Schmalzlen claims does not describe the land in controversy.

It is not alleged in the answer that the parties to this deed adopted the description which it contains by mistake, and that such deed was intended and believed by them to convey the land which is the subject of this action. If such mistake was made, it may be shown under proper pleadings, and the defendant Schmalzlen should be permitted to amend his answer by setting forth any equitable defense which he may have to this action growing out of such mistake, if it was made.

Judgment and order reversed.

On December 29, 1892, the following order was made, upon a motion of appellant to modify the judgment:—

DE HAVEN, J. The motion of appellant to modify the judgment rendered in this case on November 29, 1892, by directing the court below to enter judgment for the plaintiff on the findings, is denied.

We did not, in the opinion filed on that date, intend to be understood as saying that upon proof of the single fact that the parties to the deed of September 17, 1879, adopted the description which it contains by mistake, the defendant would be entitled to a judgment in the action, nor do we think the language used by us can be so construed. The question as to what facts should be alleged in order to constitute an equitable defense to the action growing out of such mistake, if made, was not before us, and it was not our purpose to give a complete outline of all that such a pleading should contain. The sufficiency of such an answer must be determined by the court when it is filed.

BOUNDARIES — PRESUMPTION THAT COURSES IN, ARE RUN ACCORDING TO TRUE MERIDIAN. — Where a deed describes the boundary line of the land conveyed thereby as commencing at a point west of the northeast corner of a certain section, the presumption is, that the point is due west, notwith-

standing the north line of the section is not on the true meridian, but this presumption may be rebutted by extraneous testimony: *Reed v. Tacoma Building etc. Ass'n*, 2 Wash. 198; 26 Am. St. Rep. 851, and note. And so the word "easterly," when used alone in the description of land, will be construed to mean due east, unless other words are used to qualify its meaning: *Fratt v. Woodward*, 32 Cal. 219; 91 Am. Dec. 573, and note. See *Martin v. Lloyd*, 34 Cal. 195.

[IN BANK.]

VULCAN POWDER COMPANY v. HERCULES POWDER COMPANY.

[96 CALIFORNIA, 510.]

CONTRACTS IN RESTRAINT OF TRADE, WHAT ARE. — A contract between corporations engaged in the manufacture and sale of dynamite, to the effect that none of them shall make any shipment to any part of the United States lying east of the eastern boundaries of Montana, Wyoming, Colorado, and New Mexico; that with respect to the territory west of such boundaries, none of the parties shall become interested in the manufacture and sale of dynamite, except under the provisions of the contract, and that of the aggregate quantity of the dynamite to be sold, the several parties may sell only such proportion as is designated in the contract, and should either sell in excess of such proportion, it should pay over to the other parties the profits of such excess; and that a committee to be appointed by the parties to the contract shall fix the price at which the dynamite may be sold in the states and territories embraced within the agreement, — is invalid, under a statute declaring that every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void.

CONTRACTS IN RESTRAINT OF TRADE — PATENT RIGHTS. — The fact that one of the parties to a contract was the owner of letters patent for certain methods and processes of making dynamite will not render valid a contract, otherwise void as in restraint of trade, whereby all the parties to the contract agree not to be interested in the manufacture or sale of dynamite except in certain states and territories, and that even in those states and territories each of them shall manufacture and sell a certain quantity only, and at a price to be fixed by a committee to be appointed.

CONTRACT IN RESTRAINT OF TRADE CANNOT GIVE RISE TO A CAUSE OF ACTION. The court will leave each of the parties where it finds him. If it was a part of such contract that if either of the parties should sell beyond a designated proportion of dynamite he would account to the others for the profits derived by him therefrom, the court will not compel him to submit to an examination of his books, and to account for such sum as may be found due from him according to the provisions of the contract.

T. O. Van Ness and L. A. Redman, for the appellant.

Pillsbury, Blanding, and Hayne, for the respondents.

McFARLAND, J. On June 2, 1884, a written contract was entered into by and between the Giant Powder Company, party of the first part, the California Powder Works, party of the second part, and the Safety Nitro Powder Company, the Vulcan Powder Company, and the California Vigorit Powder Company, parties of the third part, all corporations existing under the laws of this state. The contract was about the manufacture and sale of nitro-glycerine powders, called dynamite. This action was brought by the said Vulcan Powder Company, one of said parties of the third part, against all of the other parties, to enforce certain parts of said contract. The defendant the California Powder Works demurred to the complaint, upon the ground, among others, that the contract was in restraint of trade, and therefore against public policy, and void. The demurrer was sustained by the trial court, and judgment rendered in favor of said defendant. Plaintiff appeals from the judgment.

At common law, originally, all contracts which in any degree tended to the restraint of trade were void; but afterwards the rule was relaxed so as to countenance contracts for the partial restraint of trade, — that is, contracts in which the restraint was confined to reasonable limits of time or place, and which were founded upon sufficient consideration, etc. (Quite a full statement of the rule at common law is to be found in *Wright v. Ryder*, 36 Cal. 356; 95 Am. Dec. 186.) The rule, however, was uncertain, and led to much perplexing legislation; and the law upon the subject in this state is now declared in section 1673 of the Civil Code. That section is as follows: "Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void." The next two sections merely provide that one who sells the good-will of a business may agree not to carry on a similar business within a specified county or city; and that, in anticipation of a dissolution of a partnership, a partner may agree not to carry on a similar business within the city or town where the partnership business is transacted. Neither of these two exceptions apply to the case at bar; and if the contract here sued on is obnoxious to said section 1673, then the demurrer was properly sustained, and the judgment should be affirmed.

Passing, for the present, a point of appellant based upon certain patent rights, it is clear that the contract is in restraint

of trade and void. It is quite long; but for the purposes of the question now before us, it is necessary to notice only some of its provisions.

The contract, which is for a term of three years, provides that neither of the parties thereto shall make any shipment of dynamite to any part of the United States lying east of the eastern boundaries of Montana, Wyoming, Colorado, and New Mexico. With respect to the territories lying west of said boundaries, it provides that "except under the provisions of this instrument, none of the parties hereto shall be or become interested, directly or indirectly, in the manufacture or sale of dynamite powder." It provides that each party shall sell only a certain per cent "of the aggregate quantity of dynamite sold by all the parties hereto," — the per cent to be sold by some of the parties being larger than that allowed to be sold by others; and that "when any party shall exceed the said proportion, the party selling the excess, as ascertained by the quarterly statement, hereinafter more particularly referred to, shall pay over to the other parties the profits on such excess." It provides that the profits on such excess shall be ascertained by a standing committee, to whom each party shall make quarterly reports, by computing the difference between the "manufacturing cost" of such excess — said cost to be fixed by said committee — and the average price realized by all the parties. It provides that said standing committee "shall have power to fix the prices at which dynamite shall be sold in the states and territories embraced within the agreement," and that "these prices shall be known as the selling prices, and upon them all the parties hereto shall be required to settle with the standing committee." It provides that the prices and the "manufacturing cost" may be "changed, at the discretion of the standing committee"; that each party shall account to said committee for all dynamite sold; and that said committee may impose fines on any party violating the contract, and may exercise other powers not necessary to be here mentioned. And it provides that the contract may be terminated at any time, if "other party or parties shall begin the manufacturing and selling dynamite within the territory named, in competition to the parties hereto."

The above-stated provisions of the contract are clearly in restraint of trade and against public policy; and this conclusion is too obvious to need argument, authorities, or elucidation.

2. Appellant contends that the principle that contracts in restraint of trade are void does not apply to the contract here sued on, because it deals with certain patent rights.

The facts on which this point is based are these: It appears from the contract that three of the contracting parties were the owners of certain letters patent for invention of methods or processes for making dynamite. The other two parties, viz., the plaintiff herein and the Vigorit Powder Company, did not have any such patent. There is a good deal of recitation in the contract about these patents, and mention is made of an "interchange of rights" under them. It is recited that the parties are desirous of being released from all claims for any infringement, "real or alleged," of said patents, and of obtaining license from each other to manufacture under said patents; and "in consideration of the premises, and of certain valuable considerations" (not stated), they enter into the contract. As the plaintiff and the Vigorit company had no patent, it is obvious that the consideration moving from them was their covenant to refrain from competition in the dynamite business, and that they had no patent rights to "interchange."

In some text-books and decisions, it has been stated, generally, that the rule about contracts in restraint of trade being void does not apply to patent rights; but as applied in the adjudicated cases, it means only that a trader may sell a patent right, or a secret in his trade or art, and restrain himself generally from the use of it, or from other acts which would lessen the value of the patent sold. And, of course, as a patent is a sort of monopoly, the owner may manufacture under it, or not, as he pleases, and may make either a partial or entire assignment of it, and may protect his assignee, not only by an agreement not to use the patent (which would be unnecessary, because such use would be an infringement), but by a covenant not to interfere in any way with the profits to be derived from the assigned patent. The cases cited by appellant (*Morse Twist Drill etc. Co. v. Morse*, 103 Mass. 73; 4 Am. Rep. 513; *Taylor v. Blanchard*, 13 Allen, 370; 90 Am. Dec. 203; *Stearns v. Barrett*, 1 Pick. 443; 11 Am. Dec. 223; *Mackinnon Pen Co. v. Fountain Ink Co.*, 16 Jones & S. 447; *Jarvis v. Peck*, 10 Paige, 118) go no farther than this. Indeed, most of those cases go upon the old rule, that there may be a contract in partial restraint of trade, independent of the right of the patentee, and upon the principle applied in said

section 1673 of our code to the sale of the good-will of a business. But no case has been cited in which it has been held that several persons or companies can legally enter into a business combination to control the manufacture, or sale, or price of a staple of commerce merely because some of the contracting parties have letters patent for certain grades of that staple. Indeed, the contract before us is not confined to dynamite produced under the processes of the named patents. It speaks, in places, of "dynamite" generally, and provides that the contract may be terminated if "other party or parties shall begin the business of manufacturing and selling dynamite within the territory named, in competition to the parties hereto," — thus recognizing the probability of other persons, not having the patents named, entering into the business of making and selling the very commodity that is the subject of the contract.

3. Appellant contends that even though the contract be void, still this action can be maintained.

The contract provides that each of the parties shall make periodical verified reports to the standing committee of the amount of dynamite sold by it, and that each party shall have the right to make quarterly examinations of the books of account, papers, and vouchers of each of the other parties; and the gist of the complaint is, that the defendants have made false reports of the amount of dynamite sold by them, and refuse to allow an examination of the books, etc. The object of the action is to compel defendants to allow such examination of their books and papers, and for a judgment against them for such amount of money as may be found to be due from them to plaintiff according to the provisions of the contract.

The rule upon the subject is expressed in the maxim, *Ex turpi causa non oritur actio*. No cause of action can arise out of an illegal contract; and a court will leave the parties to such a contract exactly where it finds them. Courts have held, in a few instances, against the current of authority, that where money or other property has accumulated under an illegal contract, equity will not refuse to dispose of such property as between the parties. Appellant has cited some of such decisions. But in case at bar, the provisions sought to be enforced by the action are the very means established by the parties to the contract for the purpose of making sure their illegal agreements. They are inseparably interwoven with

the whole texture of the contract, and partake of its general character. To grant the prayer of the complaint would be to put into operation the only machinery by which one of the parties to the contract could enforce it against the others. They must be left where they are.

The judgment is affirmed.

CONTRACTS IN RESTRAINT OF TRADE — WHAT ARE — A contract entered into between independent dealers and manufacturers in the same line of business, which imposes unreasonable restrictions upon trade and the freedom of the parties thereto, the tendency of which is to prevent competition, is contrary to public policy and void: *Texas etc. Oil Co. v. Adams*, 83 Tex. 630; 29 Am. St. Rep. 690, and note. As to what contracts are in restraint of trade, see extended notes to *Callahan v. Donnelly*, 13 Am. Rep. 173; *Angier v. Webber*, 92 Am. Dec. 751; *Pike v. Thomas*, 7 Am. Dec. 743. A contract in total restraint of trade in a state, the tendency of which is to prevent competition in an article of commerce and create a monopoly therein, is void: *State v. Nebraska Distilling Co.*, 29 Neb. 709. See also extended notes to *Fordy v. Greasy*, 59 Am. Rep. 686, and *Smalley v. Greene*, 35 Am. Rep. 269, in which the subject is further discussed, and in which cases are collected giving instances of contracts in restraint of trade which were held valid.

DOUGLASS v. TODD.

[6 CALIFORNIA, 685.]

JUDGMENTS, MOTION TO VACATE. — COUNTER-AFFIDAVITS will not be received to rebut the allegation of merits contained in affidavits presented by a party moving for relief from a judgment by default.

JUDGMENT, RELIEF AGAINST, FOR MISTAKE OF LAW. — If a defendant fails to make his defense to an action because, after consulting with an attorney, he is advised by such attorney that his defense is not good in law, and believes and relies upon the advice so given, he may, on motion, be relieved from a judgment subsequently entered against him by default, if the attorney was mistaken, and the defense was good in law, and would have been interposed but for the advice received. A statute authorizing relief to be granted upon motion from a judgment entered against a party through his mistake, inadvertence, or excusable neglect is not restricted to mistakes of fact, but authorizes relief to be granted on account of a mistake of law.

George D. Collins, for the appellant.

Boyd, Fifield, and Heburg, for the respondent.

HAYNES, C. Appeal from an order vacating a judgment entered against defendant upon default.

The affidavit of defendant stated facts showing a sufficient defense to plaintiff's action, at least as to the first cause of action.

Plaintiff filed a counter-affidavit, which, it is contended, rebuts the facts stated in defendant's affidavit.

It is well settled that a default will not be set aside unless a sufficient affidavit of merits is filed; but proper practice does not permit the facts stated in defendant's affidavit, which constitute his defense to the action, to be rebutted by counter-affidavits. The court will not try the merits of the case upon affidavits, but will hear counter-affidavits as to the excuse for permitting the default: *Francis v. Cox*, 33 Cal. 323; *Gracier v. Weir*, 45 Cal. 53.

Defendant's affidavit, after fully stating the facts constituting his defense to the action, alleged, as the reason why he permitted a default to be taken against him, that as soon as he was served with the summons he consulted an attorney, whose name he gives, and explained to him the facts stated in his affidavit, and was advised by said attorney that he had no defense, and believing and relying upon said advice, did not answer the complaint.

Appellant does not deny in his counter-affidavit that respondent received that advice, but denies that he made default for that reason, and alleges that it was because he supposed himself to be "execution-proof." It is not probable that if that was the reason why he permitted a default to be taken, that he would have consulted an attorney in regard to a defense to the action; but having done so, and having been advised that he had no defense, it is quite natural that he should assert to plaintiff that he "could hang his judgment on the wall," — that he could n't collect it.

Appellant contends, however, that the erroneous advice of counsel as to the law of the case upon which the defendant relied, and because of which he supposed the default to be taken, is not a sufficient ground for setting it aside.

We are not referred by counsel to any case where this precise question has been decided by this court. Appellant cites cases where it is held that the negligence of the attorney will not avail to set aside a default, and contends that therefore his ignorance will not avail.

Ignorance is often the result of negligence, though it cannot always be attributed to that cause.

Defendant was not guilty of any negligence. Had he relied upon his own judgment as to the law applicable to the fact of his case, it might have been negligence. But he went to a

practicing attorney, and had a right to suppose him to be competent, and was justified in acting upon his advice.

Section 473 of the Code of Civil Procedure is broad enough to justify the action of the court below in relieving a party from a mistake of law on the part of his attorney, when, by his reliance upon it, he is prevented from making any defense.

The language of this section does not limit the relief to mistakes of fact.

Section 1576 of the Civil Code is as follows: "Mistake may be either of fact or law." So that it would seem clear that in using the word "mistake," in section 473 of the Code of Civil Procedure, without any qualification, it was intended not to restrict the court in granting relief in furtherance of justice to that kind of mistake which involves only facts. That this was the intention of the code commissioners is plain from their note to section 1576 of the Civil Code. They said: "This chapter undoubtedly modifies the rule heretofore existing in this state as to mistake of law. . . . The rule that no relief should ever be granted on the ground of mistake of law seems too harsh, and in some cases might work great hardship. There is, however, no doubt but that relief upon this ground must be granted with extreme caution, and only in a limited class of cases.

In *Whereatt v. Ellis*, 70 Wis. 207, 5 Am. St. Rep. 164, the syllabus, which correctly states the point decided, is as follows: "Where judgment for a considerable sum has been taken upon a default which was caused by the defendant following in good faith the advice of his attorney, and a meritorious defense is alleged, the court, upon application duly made, should grant a trial or hearing upon the merits upon such terms or conditions as to do no injustice to the plaintiff; and a refusal to grant such hearing is an abuse of discretion." See also *Morgan v. Bishop*, 61 Wis. 410, and *Hanson v. Michelson*, 19 Wis. 498.

In *Baxter v. Chute*, the supreme court of Minnesota, in an opinion filed June 13, 1892 (52 N. W. Rep. 379), where a default was suffered because of the ill advice of counsel, reversed the order refusing to set aside the default, and held that "a mistake of law may afford ground for relief as well as a mistake of fact." To the same effect is *Brown v. Brown*, 37 Minn. 128. In both these states the language of the statute as to the ground of relief is the same as ours.

Of course, it does not follow that all mistakes of law are to be relieved against. A sound discretion controlled by an enlightened judgment, keeping in view public interests and the due and orderly administration of the law, is to be exercised in granting that relief which justice between the parties to the cause seems to require.

The view we have taken and the authorities above cited are not inconsistent with the cases cited by appellant. Most of those cases were bills in equity to be relieved against judgments based upon circumstances materially different from the case at bar. None of them decide that equity will not relieve in proper cases. *Smith v. Tunstend*, 56 Cal. 177, is much relied upon by appellant. That was a case of negligence on the part of the attorney. The court said: "In such cases as this," parties are held not entitled to relief on account of the negligence of their attorneys. If in no case parties were relieved from the negligence of their attorneys, there would be much force in appellant's argument that no relief could be had against their mistakes. But relief is granted against the negligence of the attorney, where it is excusable, and therefore appellant's argument fails.

The terms upon which the order appealed from was granted, leaving, as it does, the plaintiff secure in his right to subject certain property of the defendant to the satisfaction of any judgment he may obtain, was proper, and prevents any injustice which might otherwise result to him.

The order appealed from should be affirmed.

VANCLIFF, C., and FOOTZ, C., concurred.

For the reasons given in the foregoing opinion, the order appealed from is affirmed.

HARRISON, J., PATERSON, J., GAROUTTE, J.

Hearing in Bank denied.

MISTAKE OF LAW — RELIEF AGAINST. — Equity will grant relief, where, by accident, mistake, fraud, or otherwise, a party has obtained an unfair advantage in a court of law, without negligence on the part of the adverse party: *Duntap v. Steere*, 92 Cal. 344; 27 Am. St. Rep. 143, and note. Mistakes of law caused by fraud, imposition, or misrepresentation may be relieved against in equity: *Kyle v. Fehey*, 81 Wis. 67; 29 Am. St. Rep. 866, and note with cases collected. See also extended note to *Black v. Ward*, 16 Am. Rep. 171-184. In our judgment, the conclusion reached in the principal case might have been rested upon the ground that the neglect of the

defendant was *excusable*; and that, had it been so rested, less injurious consequences might have resulted than are likely to follow the announcement of the rule that an attorney's error of law is a ground for relief. For if our errors are in themselves grounds for interposition in favor of our clients, surely they shall not be without causes of redress, and the worst of us shall have precedence over the best.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

DENVER AND RIO GRANDE R'Y Co. v. CHURCH.

[17 COLORADO, 1.]

TAXATION — PERSONALTY, WHERE MAY BE TAXED. — A state has a right to tax all personal property found within its jurisdiction, without regard to the place of the owner's domicile.

TAXATION OF RAILWAY CARS ENGAGED IN INTERSTATE COMMERCE. — A state has the right to tax railway cars found within its boundaries, although they are engaged in interstate commerce, and, though used, are not owned by the company to which they are assessed.

TAXATION. — ALL ROLLING STOCK owned, used, or operated by a domestic railway company is, by the Colorado statutes, placed upon the same footing with reference to state taxation, regardless of the interest, as lessee or owner, of the company operating it. It is not exempt from taxation merely because, in performing its regular journeys, it sometimes passes out of the state and becomes temporarily useful in operating other railroads.

TAXATION OF RAILWAY PERSONALTY. — Such personal property as is owned or controlled by a railway company, but is not used in the direct operation of its road within the state, cannot be taxed for state purposes, though such property may be so employed as to indirectly aid in carrying on the business.

TAXATION. — PULLMAN SLEEPING-CARS controlled and operated by a domestic railway company, though owned by a foreign corporation, may be assessed to the domestic corporation for state taxes when found within the borders of the state, although they are employed one third of the time outside the state in the transaction of business.

Wolcott and Vails, and H. F. May, for the plaintiff.

Alvin Marsh and J. H. Maupin, attorney-general, for the defendant.

HELM, C. J. When the arguments in this case were originally filed, two questions were presented for adjudication.

The first and more serious of these questions involved the constitutional right of the state to levy any tax upon Pullman sleepers. It was stipulated that the cars assessed were the "sole and exclusive" property of a corporation organized and having its principal place of business in the state of Illinois. And counsel for plaintiff contends that since they convey passengers from state to state, they are merely vehicles employed in interstate commerce, and hence are not subject to local taxation. The proposition is advanced that the attempt of the state to levy these taxes was a violation of the provision of the federal constitution investing Congress with the power "to regulate commerce . . . among the several states": Art. 1, sec. 8.

Recently, the above question has been squarely determined by the supreme court of the United States. That court employs the following language: "The fact that, instead of stopping at the state boundary, they [Pullman cars] cross that boundary, in going out and coming back, cannot affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders": *Pullman Palace Car Co. v. Commonwealth*, 141 U. S. 18.

The foregoing decision was not unanimous; three of the judges united in a dissenting opinion, and one judge did not participate. The dissenting opinion sanctions the view urged upon us by counsel. It concedes that the non-residence of the owner is not at all decisive against the right to tax; but it holds that in this regard there is a broad distinction between property which is permanently located in one state for ordinary use and sale, and property, such as that now under consideration, which is merely an appliance used in the transportation of interstate commerce. Incidentally, it is said in this opinion: "But the ships that traverse the sea and the cars that traverse the land in those lines (steamship lines and continental railways) being the vehicles of commerce, interstate or foreign, and intended for its movement from one state or country to another, and having no fixed or permanent *situs*, or home, except at the residence of the owner, cannot, without an invasion of the powers and duties of the federal government, be subjected to the burdens of taxation in the places

where they only go or come in the transaction of their business, except where they belong."

Both of these opinions are strong and persuasive; but of course we are bound to accept the view promulgated by a majority of the learned judges.

Assuming, therefore, that the cars assessed by the board of equalization are subject to taxation in this state, we turn to the remaining question submitted for consideration, viz., can such taxes be collected of the Denver and Rio Grande Railway Company, a domestic corporation, using and operating the cars, the sole and exclusive ownership thereof being, as already remarked, in a foreign corporation, with its domicile, principal office, and principal place of business in the state of Illinois?

The answer to this question must be found in the constitutional and statutory provisions regulating the subject of taxation. The case of *Pullman Palace Car Co. v. Commonwealth*, 141 U. S. 18, vindicates the right of the state of Pennsylvania to levy taxes against the Pullman company upon Pullman sleepers passing through that state. It does not, therefore, aid us in the branch of the present controversy now under consideration. In *Carlisle v. Pullman Palace Car Co.*, 8 Col. 320, 54 Am. Rep. 553, to which our attention is invited, the liability of the railway company was expressly excluded from determination; hence that opinion can only assist us as its careful reasoning upon the general subject may point toward a correct conclusion. The undoubted tendency of this reasoning foreshadows the view that property used, as well as that owned, may be assessed against the railway using it.

The constitution (art. 10, sec. 10) reads as follows: "All corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal, and other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax." The framers of the constitution have thus expressed in unequivocal language their intention to subject corporations to the payment of taxes upon personal property used by them, even though such use be not united with the ownership. It is possible that this provision is not self-enforcing, and that, standing alone, its manifest purpose would fail for want of proper regulations touching the manner of assessing and collecting the taxes referred to. But, as we shall

presently see, it is unnecessary to speculate upon such a contingency.

Before passing to a consideration of the statutes relating to revenue, it is appropriate, though perhaps not necessary, to notice briefly the character of plaintiff's control over Pullman sleepers upon its line. Notwithstanding the express statement, among the stipulated facts, that these cars are the "sole and exclusive" property of another corporation, it is obvious from the remaining provisions of the stipulation itself, coupled with concessions made by counsel in argument, that plaintiff had an important and valuable interest therein. By virtue of a contract with the owner, covering a period of fifteen years, these cars were under the control of plaintiff, with an option in favor of plaintiff for the purchase thereof. They took the place, upon plaintiff's trains, of ordinary passenger-coaches. For persons carried in them plaintiff collected the usual railroad fare; the revenue thus received being several times the amount exacted by the owner (the Pullman company) for the additional luxury of sleeping accommodations.

The Pullman company employed a car-conductor and porter to preserve order, collect berth-tickets or fares, and attend to the convenience and comfort of passengers. But the cars, like all the rest of the train, were subject to the control of the train-conductor, and the Pullman employees were governed by the general railroad regulations. In nearly all respects during the term of the contract, plaintiff's dominion over these sleepers was as complete and exclusive as if it had been the absolute owner.

Under a contract substantially similar, it was held, in Illinois, that the railway company possessed "such a qualified property" in the Pullman cars, "that, for taxable purposes, they may be regarded, within the fair meaning of the statute, as 'belonging' to the rolling stock" of the company, and subject to taxation as such: *Kennedy v. St. Louis etc. R. R. Co.*, 62 Ill. 395. The condition of our legislation, however, obviates the necessity, were we disposed so to do, of adopting the Illinois theory regarding the qualified property or ownership of the railway company.

Had subdivision 7 of section 2, found on page 318, Session Laws of 1889, been in force when the assessment under consideration was made, the present controversy could not have arisen; for this provision places the legislative intent in the premises beyond a reasonable doubt. But while the

statutes by which the present decision must be controlled are not so clear, we encounter no serious difficulty in discovering the legislative purpose.

By section 2, page 322, Session Laws of 1885, "the president, auditor, general manager, or other authorized agent of any corporation owning or operating any cars, rolling stock, or any property whatsoever on any line of railroad in the state," is required to furnish the state board of equalization, on or before April 1st of each year, with an affidavit specifying all such property "owned or operated" by the company, together with the value thereof. It is probable that, through inadvertence, reference to this provision was omitted in the succeeding section, which declares that the state board of equalization shall assess the property enumerated in the first section of the act in the manner provided by section 2847 (sec. 36, c. 94) of the General Statutes. The latter provision directs the board to assess against the railway company all personal property exclusively used in operating the road. Whether established rules of construction permit us to read the statute as if it contained this reference, we shall not pause to consider; for if they do not, we must nevertheless turn to said section 2847 for the authority of the state board in the premises.

Section 2, above mentioned, clearly operates as an implied repeal of at least so much of said section 2847 as relates to a sworn report by railway officials touching railway rolling stock. Thus for the word "owned," in section 2847, were substituted, so far as rolling stock is concerned, in section 2, the phrases, "owning or operating" and "owned or operated." By this change the legislature indicated its purpose to place all rolling stock used or operated by a railway company upon the same footing with reference to taxation, regardless of the interest, as lessee or owner, of the company operating it.

Hence the law as it stood when the tax in controversy was levied directed,—1. That the proper railway official report to the state board of equalization all rolling stock "owned or operated" by the company; and 2. That this board assess against the railway company all property "exclusively used" in operating the railroad.

We cannot concede the correctness of the proposition that the phrase "exclusively used," as thus employed, applies to such rolling stock only as always remains upon the company's lines and under its immediate control. If this were true, it would follow that rolling stock owned by the company,

which frequently passes over connecting lines, such as loaded freight-cars, might escape taxation altogether. For, under the provision directing the assessment by the board, coupled with the amendment of 1885, rolling stock owned is upon the same footing with rolling-stock leased; either must be "exclusively used." The word "exclusively" is a limitation upon the power of the state board of equalization. This specific tribunal was provided for the purpose of assessing railway property, real and personal, that cannot, in the nature of things, be intelligently and equitably reached with the ordinary taxing machinery. Such personal property as is owned or controlled by railway companies, and is not used in the direct operation of the roads, cannot be assessed by the board. This is true, even though the property may be so employed as to indirectly aid in carrying on the business. But it is unnecessary to further comment upon the affirmative legislative designs in the premises. It is sufficient for the present to declare that it was not the intent to exempt cars from taxation merely because, in performing their regular journeys, they sometimes pass out of the state, and then become temporarily useful in operating other railroads.

Considering, therefore, the existing legislation as a whole, together with the clear and imperative constitutional declaration touching the subject, we are of the opinion that Pullman sleepers controlled and operated, though not owned, by plaintiff were properly assessed to it for taxation. Whether plaintiff may compel the Pullman company to refund the taxes thus paid, is a question we are not now called upon to decide.

It appears from the agreed statement that the cars in question were employed one third of the time outside the state. In view of all the facts before us, we may fairly assume that the board of equalization took this circumstance into consideration and assessed the cars at two thirds of their actual value. Apportionments dissimilar in form, but calculated to accomplish similar equitable results, deserve commendation, and have received judicial approval: *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18.

The application for an injunction is accordingly denied.

TAXES — PERSONAL PROPERTY — WHERE MAY BE TAXED. — The personal property of a citizen of another state, employed in this state, is subject to taxation here, in the same way as though it belonged to a citizen of this state: *Battle v. Mobile*, 9 Ala. 234; 44 Am. Dec. 438, and note. Visible, tangible
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personal property, permanently located in another state, is taxable there, irrespective of the domicile of the owner: *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386; 9 Am. St. Rep. 116, and note. See notes to *Pittsburgh etc. Coal Co. v. Bates*, 8 Am. St. Rep. 521, and *Phoenix Ins. Co. v. Commonwealth*, 98 Am. Dec. 338. Tangible personal property located in any town or city of this state is taxable where situated: *Ferris v. Kimble*, 75 Tex. 476. A portable steam saw-mill temporarily located in a town is not taxable there as "machinery employed in any branch of manufactures," and "situated or employed" there, within the meaning of the statutes of this state: *Ingram v. Cowles*, 150 Mass. 155. Personal property temporarily absent from the owner's residence to be immediately returned is taxable at his residence: *Sangamon etc. R. R. Co. v. Morgan County*, 14 Ill. 163; 56 Am. Dec. 497. For an extended discussion of the question as to where personal property may be taxed, see note to *New Albany v. Meekin*, 56 Am. Dec. 523-537.

TAXES. — ROLLING STOCK OF RAILROADS, WHERE TAXABLE: See note to *New Albany v. Meekin*, 56 Am. Dec. 535. The rolling stock of a railroad is so connected with uses and purposes of the track that the legislature may treat it as real property for the purposes of taxation: *Louisville etc. R. R. Co. v. State*, 25 Ind. 177; 87 Am. Dec. 358. The rolling stock of a foreign railroad company passing across the state for the purpose of interstate commerce is not subject to taxation in that state: *Bain v. Richmond etc. R. R. Co.*, 105 N. C. 363; 18 Am. St. Rep. 912.

TAXATION OF HIRED SLEEPING-CARS. — Sleeping-cars hired and run by a railroad in Colorado from a company in Illinois having no office or place of business in Colorado are taxable in the latter state: *Carlisle v. Pullman etc. Car Co.*, 8 Col. 320; 54 Am. Rep. 553.

PEROT v. COOPER.

[17 COLORADO, 82.]

NEGOTIABLE INSTRUMENTS — CONSIDERATION, WHEN PRESUMED. — When the execution and delivery of a note is admitted, the presumption is that it is founded upon a sufficient consideration.

NEGOTIABLE INSTRUMENTS — POSSESSION, WHEN RAISES PRESUMPTION OF OWNERSHIP. — Possession and the production of a note unannulled and unextinguished by indorsement of payments, or otherwise, is *prima facie* evidence that the holder is the owner, and that the note is unpaid.

Plea of PAYMENT IS AN AFFIRMATIVE DEFENSE, and must be supported by a preponderance of the evidence.

MORTGAGE. — A CONVEYANCE ABSOLUTE IN FORM will be adjudged to be a mortgage, when it is shown, by evidence clear, certain, unequivocal, and trustworthy, that such instrument was executed, delivered, accepted, and intended by the parties to secure the payment of a debt. But when there is a substantial conflict in the evidence, a mere preponderance thereof is not sufficient to warrant a change in the character of a deed or other solemn instrument in writing.

PAYMENT — APPLICATION OF. — A person indebted on separate and distinct accounts has the right to have his payments applied to such account as

he shall direct. A creditor receiving the money with such direction is bound to give credit accordingly; but if a payment is made without direction as to its application, the creditor may apply it to any debt due him at the time from such debtor.

PAYMENTS — IMPLIED APPLICATION OF. — It is not always necessary that a debtor expressly direct the application of a payment made to his creditor, and if from the circumstances his purpose may be clearly implied, the creditor is bound to regard it. When a creditor claims that his debtor owes him upon two separate demands, one of which is admitted and the other disputed, a payment made by the debtor will be presumed, in the absence of evidence, to be made upon the demand admitted, rather than upon the one disputed, at the time of making such payment. So, also, an undesignated payment will be applied to an interest-bearing demand, rather than to one not bearing interest.

INSTRUCTIONS — REVERSIBLE ERROR. — The giving of an instruction which is misleading as to the issue, inapplicable to the evidence, and calculated to prejudice the substantial rights of the losing party entitles him to a reversal.

R. H. Gilman and I. E. Barnum, for the plaintiff in error

H. T. Bemet and W. O. Kingsley, for the defendant in error.

ELLIOTT, J. The principal matters in controversy in this cause having occurred before the death of Isaac Cooper, both parties were placed at a disadvantage in the production of evidence, — the defendant by the death of her intestate, the plaintiff by force of the statute: See Acts 1870, p. 63; Mills's Ann. Stats., sec. 4816.

It was admitted upon the trial that the consideration for the notes sued on was a loan of twenty thousand dollars made by Perot to Isaac Cooper on the day the notes bear date; and that said loan was also the consideration for the contract or "agreement" made between said parties on the same day, to wit, September 30, 1882. By the terms of said contract, Isaac Cooper, in consideration of one dollar and other good and valuable considerations acknowledged to have been received by him, covenanted and agreed to transfer and convey to said Perot certain interests in certain stocks, bonds, lands, letters patent, etc.

It is undisputed that on February 25, 1887, the plaintiff Perot and Isaac Cooper met in the city of Philadelphia and negotiated a settlement of certain matters pertaining to the contract of September, 1882, whereby said Perot was to receive a deed or deeds for one hundred lots in the town of Glenwood Springs, Colorado, and also to receive from said Cooper the sum of \$34,878.42 in money, a portion of which sum is conceded to have been for interest accrued to that date on the

\$20,000 notes. The money and the lots were duly received by Perot.

In behalf of defendant, it is contended that the settlement thus negotiated was, when carried into effect, payment in full of the principal of the twenty-thousand-dollar notes as well as the interest thereon. The claim is, that the moneys thus paid and the lots thus conveyed were in settlement of the contract of September, 1882; that said contract having been entered into at the time of the giving of the notes, and for no other or different consideration, was collateral to the notes merely, and was only intended to secure their payment; and therefore, that when a sum of money equal to the principal and interest on the notes was realized by the payee out of such security, the notes were in fact paid. In support of this theory, counsel for defendant cite *White and Tudor's Leading Cases in Equity*; *Hara and Wallace's notes to Thornbrough v. Baker*, and *Howard v. Harris*.

In behalf of the plaintiff, it is contended that the agreement made in September, 1882, was, in fact as well as in form, a contract to transfer and convey absolutely to the plaintiff the property therein described, and was so intended by the parties; and that the settlement negotiated in February, 1887, did not include, and was not intended to include, the principal of the twenty-thousand-dollar notes. In support of this claim, plaintiff relies upon certain letters written by Isaac Cooper in his lifetime, and other documentary evidence; also upon the testimony of the attorney who prepared the agreement of February, 1887, to convey the one hundred lots; and also upon the circumstance that the notes were at that time left in possession of the plaintiff, Perot, without any provision either orally or in writing for their surrender, and other circumstances.

The execution and delivery of the notes being admitted, the presumption would be, in the absence of proof, that they were founded upon a sufficient consideration to sustain the plaintiff's cause of action. In addition to this, a full consideration for the notes was expressly admitted on the trial. The possession and production of the notes by the plaintiff at the trial, uncanceled and unextinguished by indorsements of payments or otherwise, were *prima facie* evidence that the plaintiff was still the owner of them, and that they were unpaid, except as to the interest admitted to have been paid to February 25, 1887; *Somervail v. Gillies*, 31 Wis. 152.

The general rule is, that a plea of payment, being an affirmative defense, must be supported by a preponderance of the evidence, in order to be effective in favor of the party pleading it. It was necessary, therefore, to justify a verdict in favor of defendant upon the plea of payment, that she should have produced evidence sufficient to overcome the *prima facie* evidence in favor of plaintiff arising from the notes being in his possession, and also to outweigh any other evidence in the case tending to show that the notes were unpaid.

In determining whether or not the principal of the notes had or had not been paid, each party was entitled to have all the evidence, facts, and circumstances bearing upon that issue duly weighed and considered in the light of correct instructions as to the law bearing upon the subject.

To warrant a verdict in favor of defendant upon the plea of payment, it was necessary that the evidence should sustain one or the other of the following propositions: 1. That the written contract or agreement of September 30, 1882, was in fact intended as a mortgage, — that is, that it was given and accepted merely as collateral security to the notes; or 2. That the settlement of February 25, 1887, was intended by both parties, when actually carried into effect, to include the payment of the principal as well as the interest of the twenty-thousand-dollar notes.

Since the written contract of September, 1882, accompanying the execution of the notes, purported on its face to be an absolute contract to convey an interest in land and other property, plaintiff was entitled to have its absolute character upheld at the trial, unless, by evidence clear, certain, and unequivocal, the fact was established beyond substantial doubt that such contract was in fact given and accepted merely as collateral to secure the payment of the notes. Upon the first proposition above stated, a mere preponderance of evidence was not sufficient. The court below erred in not instructing the jury in substantial accordance with this statement of the law.

Neither the instruction prayed by plaintiff and refused, nor the instruction given by the court in lieu thereof, was correct in substance as a statement of the law applicable to the issue and evidence respecting the contract of September, 1882. The real purpose of that contract being the matter at issue and on trial, the court could not consistently instruct the jury that it "created in the plaintiff an absolute right to

the property" therein described, for that was the very question to be determined by the jury from the evidence as a question of fact. Neither could the court properly submit the question of the construction of the contract to the jury. The contract being plain and unequivocal, it was the province of the court to interpret it according to its terms, and thereupon to instruct the jury that the plaintiff was entitled to have the same enforced and his rights thereunder protected according to its terms, unless upon a certain kind and *quantum* of proof the jury should be warranted in finding that the contract was intended by the parties to subserve a different purpose, — that is, the purpose of collateral security to the notes.

We are not prepared to say that an instruction as to the *quantum* of proof in cases of this kind must necessarily contain the words "beyond a reasonable doubt," — words borrowed from the criminal law. A conveyance absolute in form may be found and adjudged to be a mortgage in fact, when it is shown, by evidence, clear, certain, unequivocal, and trustworthy, that such instrument was executed, delivered, accepted, and intended by the parties merely as collateral to secure the payment of a debt. Such kind of evidence, whether documentary, circumstantial, or from the mouths of credible witnesses, may well be accepted as convincing beyond a reasonable or substantial doubt, unless there be material and reliable evidence to the contrary. But where there is a substantial conflict in the evidence, a mere preponderance is not sufficient to warrant a change in the character of a deed or other solemn instrument of writing.

This court has several times expressed views closely analogous to the foregoing. An examination of the decisions will show that while the same formula of words has not always been employed, the same rule has been substantially announced, though in different phraseology: See *Whitsett v. Kershaw*, 4 Col. 423; *Bohm v. Bohm*, 9 Col. 111; *Townsend v. Petersen*, 12 Col. 491; *Armor v. Spalding*, 14 Col. 805.

The general rule is, that a debtor paying money to his creditor has the right to direct how the money shall be applied, — that is, if he be indebted on separate and distinct accounts, he may have the money applied on such account or accounts as he shall direct, and the creditor receiving the money with such directions is bound to give credit accordingly. But if the debtor pay money to his creditor without directions as to

its application, the creditor may apply the same to any debt due him at the time from such debtor. It is not, however, always necessary that the debtor should expressly state his purpose as to the application of the payment; if from the circumstances of the case his purpose may be clearly implied, the creditor is bound to regard it. Thus where a creditor claims that his debtor owes him upon two separate demands, one of which is admitted and the other disputed, if the debtor, under such circumstances, makes a payment to his creditor, it will be presumed, in the absence of evidence to the contrary, that the payment is made upon the demand admitted, rather than upon the one in dispute, at the time of making such payment. So, also, an undesignated payment will be applied to an interest-bearing demand rather than to one not bearing interest: 2 Parsons on Contracts, 629 et seq.; 2 Chitty on Contracts, 1110 et seq.; *Gass v. Stinson*, 8 Sum. 109; *Pattison v. Hull*, 9 Cow. 747.

Error is assigned to the giving of instruction No. 9. It reads as follows: "When a creditor has two demands against the same debtor, one secured by mortgage and the other an account unliquidated, a payment undirected by either party will be applied by the law to the debt so secured."

There has been some controversy as to the correctness of the instruction thus announced as a proposition of law. In this case, however, we need not undertake to settle the controversy, as the instruction was not applicable to the case on trial. The instruction assumes that there were two demands in litigation, one secured and the other unsecured. This was not according to the claim of either party; nor was there any evidence to support such a view of the case. It is true, the plaintiff asserted two demands, one on the notes and the other on the contract of the same date; but the plaintiff did not claim that either demand was secured by mortgage or otherwise; neither did the defendant contend that there were two demands, one secured and the other unsecured. On the contrary, the defendant insisted that there was but one demand, — the twenty-thousand-dollar notes, — and that there never had been any other demand against her intestate in favor of plaintiff.

The defendant admitted the plaintiff's demand on the notes, but denied that he had any separate or distinct demand upon the contract. It was substantially agreed by both parties that the one hundred lots and the \$34,878.42 in money were re-

ceived by plaintiff on account of the contract. The plaintiff, however, claimed that the property and money thus received were received on account of the independent demand based upon the contract itself. The claim of defendant was, that, the contract being collateral to the notes, the proceeds of the collateral thus coming into the hands of plaintiff had the effect to pay and discharge the notes. Thus, according to the claims of both parties, the determination of the issue respecting the character of the contract of September, 1882, was practically decisive of the whole controversy.

The attitude of the respective parties may be represented thus: The plaintiff says that the lots and the money received by him in pursuance of the settlement of February, 1887, were received merely on account of the contract of September, 1882, together with the interest on the notes, and now he demands judgment for the principal of the notes. The defendant says: True, the lots and the money thus received by plaintiff were received on account of the September contract, and inasmuch as that contract was merely collateral to the notes, everything realized upon it must be credited on the notes, and thus the notes have been paid in full, principal as well as interest.

From the foregoing it is apparent that the giving of instruction No. 9 was misleading as to the issue, and inapplicable as to the evidence. It was, moreover, calculated to prejudice the substantial rights of the losing party. Hence the error in giving it cannot be held to have been harmless.

As the relief asked by plaintiff in this court extends only to the first cause of action, we need not consider the remaining assignments of error. The judgment of the district court is reversed, and the cause remanded.

NEGOTIABLE INSTRUMENTS — PRESUMPTION OF CONSIDERATION. — A promissory note imports a consideration: *Cartwright v. Gray*, 127 N. Y. 92; 24 Am. St. Rep. 424, and note. A bill of exchange is good, although it does not contain the words "for value received," and in an action thereon, no consideration need be proven: *Hubble v. Fogartie*, 3 Rich. 413; 45 Am. Dec. 775.

NEGOTIABLE INSTRUMENTS — POSSESSION PRIMA FACIE EVIDENCE OF OWNERSHIP. — It is presumed, *prima facie*, that the holder of negotiable paper is the owner, and took it for value before dishonor: *Commercial Bank v. Burgyrn*, 108 N. C. 62; 23 Am. St. Rep. 49, and note. The production of a note, and proof that its indorsement was made before maturity, raises the presumption that the holder acquired it in the due course of business: *Tabor v.*

Merchants' Nat. Bank, 48 Ark. 454; 3 Am. St. Rep. 241, and note. See also *Voorburgh v. Dieffendorf*, 119 N. Y. 357; 16 Am. St. Rep. 836, and note.

MORTGAGES — CONVEYANCE ABSOLUTE IN FORM, WHEN TREATED AS. — A deed absolute in form given to secure a debt will be treated as a mortgage: *Bozman v. Gallagher*, 24 Neb. 79; *McNeel v. Auldridge*, 34 W. Va. 748; *Waters v. Orakites*, 105 N. C. 394; *Silberberg v. Pearson*, 75 Tex. 287; *Armor v. Spalding*, 14 Col. 302; *Mitchell v. Fullington*, 83 Ga. 301; *Scanlan v. Scanlan*, 134 Ill. 630; *Smith v. Smith*, 80 Cal. 323; *Jameson v. Emerson*, 82 Me. 359; *Wakefield v. Day*, 41 Minn. 344; *Stewart v. Fellows*, 128 Ill. 480; *Malone v. Roy*, 94 Cal. 341; *Moisant v. McPhee*, 92 Cal. 76; *Rogers v. Jones*, 92 Cal. 80; *Gilchrist v. Beswick*, 33 W. Va. 168; *Hack v. Hill*, 106 Mo. 18; *Cobb v. Day*, 106 Mo. 278; *Gamble v. Ross*, 88 Mich. 315; *Winston v. Burnell*, 44 Kan. 267; 21 Am. St. Rep. 289, and note; note to *Mannix v. Purcell*, 15 Am. St. Rep. 584; extended note to *Hutaler v. Phillips*, 4 Am. St. Rep. 607; *Campbell v. Roddy*, 44 N. J. Eq. 244; 6 Am. St. Rep. 889; *Bigelow v. Topliff*, 25 Vt. 273; 60 Am. Dec. 264, and note.

DEBTOR AND CREDITOR — RIGHT OF DEBTOR TO APPLY PAYMENTS. — In respect to the appropriation of payments made by a debtor to a creditor who holds more than one debt against him, the debtor may generally appropriate the payments, and if he does not, the creditor can: *Phillips v. Herndon*, 78 Tex. 378; 22 Am. St. Rep. 59, and note; *Flower v. O'Bannon*, 43 La. Ann. 1042. See also *Washington etc. Gas Co. v. Johnson*, 123 Pa. St. 576; 10 Am. St. Rep. 553. When a tenant directs his landlord to apply certain cotton to the payment of rent, the landlord cannot apply it to the payment of an account for supplies: *Atkinson v. Cox*, 54 Ark. 444. See *Blake v. Sawyer*, 83 Me. 129; 23 Am. St. Rep. 762, and note, with cases collected discussing the application of payments by creditors.

ROCKWELL v. DISTRICT COURT OF LAKE COUNTY.

[17 COLORADO, 118.]

JUDGMENTS — EXECUTION UPON AFFIRMANCE OF JUDGMENT. — When a judgment has been affirmed on appeal, and the cause remanded to the court of original jurisdiction, the general rule is, that the prevailing party is entitled to have execution issue upon such judgment from the court thus reinvested with the custody of the record.

JUDGMENTS. — APPEAL BOND SERVES TO SUSPEND THE ENFORCEMENT OF THE JUDGMENT pending the appeal, and to give the appellee additional security for his debt in case the judgment is affirmed or the appeal dismissed; but it is not a substitute for the judgment appealed from, nor does the appellee receive it in satisfaction thereof.

MERGER. — JUDGMENT UPON AN APPEAL BOND does not extinguish the judgment appealed from.

JUDGMENT ON APPEAL BOND — MERGER OF ORIGINAL JUDGMENT — ISSUE OF EXECUTION. — When a judgment appealed from has been affirmed, and an action on the appeal bond has been prosecuted to judgment, and such judgment is pending on appeal, the original judgment is not merged in or extinguished by the judgment on the appeal bond, so as to prevent the issuance of execution on the former.

JUDGMENTS — WHEN RES JUDICATA. — The doctrine of *res judicata* is applicable only to those judgments, decrees, or orders of record which are so far material and final that a review thereof may be had through the ordinary procedure, such as appeals or writs of error. The granting or refusing of other applications or motions does not necessarily prevent a subsequent renewal thereof upon the same or different grounds, when jurisdiction over the subject-matter remains in the same tribunal.

JUDGMENTS — ORDER QUASHING EXECUTION NOT RES JUDICATA. — No appeal or writ of error lies from an order of the district court quashing an execution, and the doctrine of *res judicata* does not apply thereto.

PETITION to reverse orders of the district court quashing certain executions. The petition is based upon the facts that Rockwell and others obtained judgment in the district court against Butler and others. This judgment was affirmed on appeal, and a mandate showing such affirmance was filed in the district court. The cause was thereafter taken to the supreme court of the United States by writ of error, but such writ was dismissed by that court for want of jurisdiction. Rockwell thereafter obtained the issuance of executions on such judgment out of the district court, but they were recalled and quashed on motion of Butler, and upon the ground that, subsequent to the affirmance of such judgment, Rockwell had prosecuted an action on the appeal bond given thereunder to judgment, which judgment had been appealed from, and such appeal is still pending and undecided.

L. C. Rockwell, for the petitioners.

H. Riddell and Hugh Butler, for the respondents.

ELLIOTT, J. The appropriateness of this proceeding as a remedy for the grievance complained of is not questioned. The argument of respondents upon the demurrer is directed to the merits of the application. Thus the record presents for determination the single question, Are petitioners, under the facts and circumstances stated in their petition, entitled to execution upon their original judgment?

When a judgment has been affirmed and the cause remanded by the supreme court to the court wherein the judgment was originally rendered, and when the mandate of the appellate court showing such affirmance has been duly filed in the office of the clerk of the lower court, the general rule is, that the prevailing party is entitled to have execution issue upon such judgment from the court thus reinvested with the custody of the record. This is the rule of the common law, and, in this state, the express command of the statute: Free-

man on Executions, secs. 13, 32; Code, sec. 399. But it is contended that an exception to the rule exists in this case. The exception is sought to be maintained upon several grounds, which will be noticed in their order.

1. It is claimed that the original judgment is merged in the judgment upon the appeal bond; or in other words, that by accepting and obtaining judgment upon the appeal bond the original judgment has been extinguished. It is scarcely necessary to discuss at length the familiar doctrine of merger, —the absorption of the less by the greater. Undoubtedly, the appeal bond has been merged in the higher security of the judgment rendered thereon. But even if it be conceded that a judgment upon a judgment merges the former judgment in the latter, the concession is not conclusive of the present controversy, since no judgment has been rendered or action brought upon the original judgment.

One of the strongest reasons why a judgment upon a judgment in the same jurisdiction, and especially in the same court, should be held to merge the former judgment in the latter, is, that otherwise the debtor might be subjected to increased costs and expenses by successive judgments, and harassed without limit by a multiplicity of record liens, executions, and other supplementary proceedings for the satisfaction of a single indivisible demand against the same party without any corresponding benefit to the creditor: Freeman on Judgments, sec. 216. But such consequences could not be entailed upon the debtor to the same extent by obtaining judgment upon an appeal bond, even though thereafter the original judgment should continue in full force and effect; besides, the judgment upon the appeal bond would give the creditor the additional benefit of execution or other relief against the surety.

It is easy to demonstrate that a judgment upon an appeal bond, under our practice, does not have the uniform effect of extinguishing the original judgment. For example, suppose, for any reason, in an action upon an appeal bond, as by a failure to produce evidence, a judgment of *nil capiat* should be rendered against the plaintiff, would he thereby lose all remedy upon his original judgment also? Again, suppose a judgment relating to a freehold should be appealed from and affirmed, would a judgment upon the appeal bond destroy the effect of the original judgment as a muniment of title? Examples of this kind might be multiplied. But when the bond

is given to secure a money judgment merely, the question is not so easily disposed of, and must be considered and determined upon principle, as there are no adjudications precisely in point, — at least none have been cited in argument.

2. An appeal bond, under our practice, has a twofold office: it serves to suspend the enforcement of the judgment pending the appeal, thus giving the appellant an opportunity to have the judgment reviewed, and reversed if he can show the same to be erroneous; it serves, also, to give the appellee additional security for his debt in case the judgment be affirmed or the appeal dismissed. The term "debt" is here used in the sense that a judgment is a debt of record: 2 Bla. Com. 465; Freeman on Judgments, sec. 217.

In order to obtain an appeal, the statute provides, *inter alia*, that the appellant shall give bond with surety, "conditioned for the payment of the judgment, costs, interest, and damages in case the judgment shall be affirmed." The statute further provides that "the obligee in such bond may at any time, on a breach of the condition thereof, have and maintain an action at law, as on other bonds": Code, sec. 388. The statute recognizes the judgment as the principal debt, and the judgment debtor as primarily liable, though as between the obligors and obligee all the obligors are equally liable upon the bond itself: *Anderson v. Sloan*, 1 Col. 487.

The appeal bond is a conditional obligation, whereby the obligors covenant to pay the judgment upon the happening of a contingent event, to wit, the affirmance of the judgment. If the judgment be affirmed, the obligation to pay becomes absolute. It is conceded that the payment, satisfaction, or discharge of the original judgment would relieve the obligors from liability. But the judgment debtor being primarily liable, it would seem to be contrary to all the analogies of the law that a judgment upon the appeal bond against the sureties, or against the debtor and his sureties, without satisfaction, should operate to satisfy the unpaid original judgment against the principal debtor: *Chipman v. Martin*, 13 Johns. 240; *Bank of Chenango v. Hyde*, 4 Cow. 567; *White v. Smith*, 33 Pa. St. 186; 75 Am. Dec. 589; *United States v. Hoyt*, 1 Blatchf. 826.

The judgment creditor, by force of the statute, receives the appeal bond as security for his judgment; he is not required to accept it in satisfaction of his judgment. In case of a breach of the condition of the bond, the statute authorizes the

obligee to maintain an action thereon, — not merely to bring an action, but to maintain it, — that is, to recover judgment upon it; and this authority is given to the obligee without condition, — without requiring him to relinquish any right upon the original judgment. There is nothing in the language of the statute to indicate that the action upon the appeal bond was intended as an alternative, rather than a cumulative remedy.

3. An appeal bond is in no sense a substitute for the judgment appealed from. It operates to suspend the enforcement of the judgment for a limited time, but it does not take the place of nor nullify the judgment. On the contrary, notwithstanding the appeal bond, the judgment may be affirmed, and thus all barriers to its enforcement may be removed. In that case, does the appeal bond become void, and without force or effect? Clearly not; it then becomes, for the first time, an available security for the payment of the judgment. While the enforcement of the judgment is suspended by the appeal, the bond is but a contingent security, and appellee can have no remedy upon it. It is only when the original judgment becomes enforceable by affirmance, or by the failure of the appeal, that appellee can resort to his action upon the bond. Thus it is apparent that the appeal bond is not a substitute for the original judgment. Its vitality depends upon the survival of the judgment. Its fate is inseparably linked with the judgment. If the judgment be reversed, the obligation of the appeal bond becomes void; if the judgment be affirmed, the obligation remains in full force and effect. Such, in substance, is the language; such is the legal tenor and effect of the bond.

4. In some states, by statute, it was formerly provided that upon the levy of an execution the defendant might give a forthcoming or delivery bond, and thus have the levy released or discharged; that such bond, when forfeited, should have the force and effect of a judgment upon which execution might issue; and that the levy of an execution of the latter kind could not be thus released or discharged. Under such procedure, it has been held that the original judgment was merged in or extinguished by the statutory judgment based on the giving and forfeiture of the bond: *Chitty v. Glenn*, 3 T. B. Mon. 424; *Whiting v. Beebe*, 12 Ark. 548; *Frazier v. McQueen*, 20 Ark. 68; *Brown v. Clarke*, 4 How. 4; *Bank of United States v. Patton*, 5 How. (Miss.) 200; 35 Am. Dec. 428.

Our criminal code (Mills's Ann. Stats., sec. 1473) contains a provision whereby a judgment imposing a fine or costs for a criminal offense may be replevied by the giving of a certain kind of recognizance. Such replevin recognizance is in many respects similar to the forthcoming or delivery bonds above referred to. The replevin recognizance is an engagement to pay absolutely within a definite period without further litigation; it is entered of record before the court by one or more good and sufficient freeholders; it has the force and effect of a judgment, and creates an immediate lien upon the property of the parties acknowledging the same; and execution may issue thereon without the previous issue of a *scire facias*.

It will be readily observed that there is little or no analogy between the replevin recognizance in criminal cases and the appeal bond in civil actions. The appeal bond, as we have seen, is a conditional, not an absolute, obligation; it is not given to end litigation, but rather for the purpose of continuing it; on the part of appellant, it is given not so much to secure the payment of the judgment as to enable him to overthrow it; it is not entered of record; it creates no lien upon the property of those signing it; and the only remedy it gives is, that the obligee may bring another suit upon it by assuming the burden of proof in respect thereto. At best, it gives a cause of action which may be the subject of further controversy, as is illustrated in the present case. It is unnecessary to further contrast these provisions. It is manifest that an appeal bond in civil actions under our law does not have the force or effect of a judgment like the forthcoming or delivery bond in other states; nor is there any legal or equitable consideration why a judgment upon it should be held to extinguish the original judgment.

5. In Iowa, it was provided by statute that when a judgment was affirmed by the supreme court the appellee might, at his election, have an affirmance, with an order directing a *procedendo* for the enforcement of the judgment of the district court as though no appeal had been taken, or he might have a new judgment rendered by the supreme court against the appellant and his sureties upon his *supersedeas* bond for the amount of the judgment, etc. In the case of *Swift v. Conboy*, 12 Iowa, 444, it was held that when the appellant elected to take the latter course, the judgment of the lower court became merged in the new judgment rendered by the supreme court. This doctrine does not militate against, but rather

fortifies, the view we have taken. In the Iowa case, by the appeal the record was transferred into the supreme court. Appellee chose to retain it there. There was no *procedendo*, no *remittitur*, no remanding of the cause, no mandate to the district court showing the affirmance of the judgment, and hence no reinvesting of the lower court with the custody of the record: Freeman on Executions, secs. 18, 32. In the case now before us the petition shows that no new judgment was rendered in the appellate court; the judgment was simply affirmed and the cause remanded; and petitioners have not at the present time any other judgment than the original one remaining of record in the district court upon which execution can issue. Unless they can enforce such original judgment, the only benefit they have gained by its affirmance, or by the appeal bond thus far, is the privilege of further litigation.

6. Another ground upon which it is contended that execution should not issue upon the original judgment is, that by appealing from the judgment upon the appeal bond the issue as to the affirmance or non-affirmance of the original judgment is still pending and undetermined, and that until the determination thereof it would be illegal and inequitable to allow execution to issue. It is true, the petition in this case shows that in the suit upon the appeal bond the defendants pleaded that the original judgment had not been duly affirmed by the supreme court. But the petition does not admit the truth of such plea, nor does it admit any facts tending to show such plea to be true. On the contrary, it is expressly averred in the petition that said original judgment was in all things duly affirmed, and that a proper mandate showing such affirmance was duly issued and filed in the court below, as required by the statute. The averments last mentioned are conclusive against the truth of the plea in the action upon the appeal bond. Such plea was no more than a plea of *nul tiel* record, which puts in issue only the existence of the record: *Bennett v. Morley*, 10 Ohio, 102. The defendants could not, under such a plea, by any amount of evidence, overcome matters properly shown by the record of the supreme court. This court alone has jurisdiction to determine questions relating to the validity and effect of its own records, subject to the supreme court of the United States in proper cases. The petition shows that the United States supreme court refused to entertain jurisdiction of the first appeal. If

by the mere tendering of such an issue in an action upon an appeal bond, execution might be stayed upon the original judgment, the benefit of an appeal bond as security to the appellee would be greatly impaired, if not altogether destroyed. This would certainly be contrary to the purpose and intent of the statute providing for such securities, and would not be in furtherance of justice or equity: *Marysville v. Buchanan*, 3 Cal. 212; *Dihrell v. Eastland*, 8 Yerg. 507.

The position assumed by counsel for respondents may be summarized as follows: When a creditor obtains judgment, the debtor, by giving bond, may suspend the enforcement of the judgment pending the appeal. If a reversal be secured, both the judgment and the appeal bond will be held for naught. If the judgment be affirmed, the creditor may have execution upon the original judgment, or he may have his action upon the bond; but he cannot pursue both remedies. If he brings an action upon the bond, he shall be held to have abandoned his original judgment. But may the creditor have immediate judgment and execution upon the bond? O, no; if action be brought upon the bond, the debtor and his sureties may interpose any kind of defense, and if defeated, may take a second appeal; and still the creditor shall not have execution upon the original judgment. With due respect for the able argument of counsel in support of this view, we cannot adopt it. After much deliberation, we are of opinion that petitioners are entitled to have execution issued upon their original judgment. The demurrer to the petition must therefore be overruled.

Under the stipulation of counsel in open court that the merits of the controversy herein should be heard and determined upon the petition and demurrer aforesaid, the same as though the writ of *certiorari* had actually issued, the several judgments of the district court quashing the executions upon petitioners' original judgment, as stated in their petition, are reversed.

ON REHEARING.

Per CURIAM. Two propositions only are urged in support of the present application. The first is, that the supreme court commission was an illegal body, and hence the judgment upon which the execution under consideration issued was not legally affirmed. Upon the authority of *De Votis v. McGerr*, 14 Col. 577, and *Butler v. Rockwell*, 17 Col. 290, the constitu-

tional question is not involved, and need not be further considered.

The second proposition rests upon a legal contention not noticed in the opinion heretofore filed. It is insisted that the ruling of the court below in quashing the first execution is *res judicata*, and that therefore this court cannot inquire whether error was committed in ruling upon the second execution, which shared a similar fate. Counsel contend that the correctness of these judicial rulings could only be questioned by *certiorari*, or by some other proper proceeding to review the order upon the first execution.

The doctrine of *res judicata* is applicable only to those judgments, decrees, orders, or rulings of record which are so far material and final that a review thereof may be had through the ordinary procedure provided, such as appeals or writs of error. The granting or refusing of other applications or motions does not necessarily prevent a subsequent renewal thereof upon the same or different grounds, where jurisdiction over the subject-matter remains in the same tribunal. A dignified and orderly procedure has undoubtedly prompted the recognition, by courts, of the rule forbidding repeated applications to rehear motions of the latter class on grounds previously urged. But this rule is not based upon the principle of *res judicata*; and the entertainment of such renewed applications is purely discretionary with the court. A proper respect for judicial announcements has led to the established practice of submitting a preliminary petition to the court for leave to renew the motion denied. But the court itself may waive this rule of procedure; and if, without objection, it entertains the motion challenging its former ruling, and reconsiders the same on the merits, its action will be treated as if such preliminary leave had been granted: Freeman on Judgments, 8d ed., secs. 325, 326.

In this state, no appeal lies from, or writ of error to, an order of the district court quashing an execution. True, there is a statutory method whereby this court can consider rulings made below upon incidental matters subsequent to final judgment, through an appeal from or writ of error to the final judgment itself: See Sess. Laws 1889, p. 73, amending Code, sec. 78. But this remedy is not available to a party who is satisfied with the judgment, and who only asks the privilege of collecting the same in the manner provided by

law. The ordinary methods of review do not apply to such rulings as the one now under consideration.

Both of the executions under consideration issued from the same court, and both rulings quashing these executions were made by the same judge at the same term; the judgment is in full force, hence it was not the purpose nor effect of either execution to revive a dormant judgment. We do not think the doctrine of *res judicata* applicable; and since the court raised no objection to the form of the proceeding, such objection, if any there was, will be treated as waived.

It has already been observed, in the opinion heretofore filed, that no question is made as to the regularity or propriety of considering by *certiorari* the various matters submitted.

The judgment of this court reversing the several judgments of the district court must be adhered to as directed by the foregoing opinion.

APPEAL BONDS — EFFECT OF. — The giving of a forthcoming bond by one of several defendants discharges from the original judgment those who do not join in the bond: *Coffee v. Planters' Bank*, 11 Smedes & M. 453; 49 Am. Dec. 68; *contra*, *Robinson v. Sherman*, 2 Gratt. 178; 44 Am. Dec. 381, and note; see *Olson v. Nunnally*, 47 Kan. 391; 27 Am. St. Rep. 296.

JUDGMENT ON APPEAL BOND — MERGER OF ORIGINAL JUDGMENT. — The legal effect of a judgment on a forfeited delivery bond is a satisfaction and discharge of the original judgment while the second judgment remains in force: *Wright v. Yell*, 13 Ark. 503; 58 Am. Dec. 336, and note; *Davis v. Dixon*, 1 How. 64; 26 Am. Dec. 695; *Bank v. Patton*, 5 How. 200; 35 Am. Dec. 423, and note; *Lipecomb v. Grace*, 26 Ark. 231; 7 Am. Rep. 607. But under the Texas statute, a forthcoming bond returned "forfeited," on which execution may be issued, is not regarded as a judgment so as to make it a satisfaction of the original judgment: *Cole v. Robertson*, 6 Tex. 356; 55 Am. Dec. 784.

JUDGMENTS — RES JUDICATA — FORM OF THE ADJUDICATION. — A judgment, to have the authority of *res judicata*, must be a definite judgment of condemnation or dismissal upon the merits of the case: *Scherff v. Missouri Pac. Ry Co.*, 81 Tex. 471; 26 Am. St. Rep. 823, and note; *Burner v. Hevener*, 24 W. Va. 774; 26 Am. St. Rep. 943, and note. See notes to *Flippen v. Dixon*, 29 Am. St. Rep. 656, and *Williams v. Field*, 60 Am. Dec. 427-437.

COMBS v. AGRICULTURAL DITCH COMPANY.

[17 COLORADO, 146.]

IRRIGATION. — **MANDAMUS IS AN APPROPRIATE REMEDY** to compel the delivery of water for irrigation purposes.

WATERS — **RIGHTS OF CONSUMERS.** — A ditch company carrying water for general purposes of irrigation cannot arbitrarily refuse to supply water to an actual and *bona fide* consumer making seasonable application, and offering proper compensation.

WATERS — **RIGHTS OF PRIOR APPROPRIATORS AS AGAINST DITCH COMPANY.** — A company may organize for the purpose of constructing an irrigation ditch and divert the unappropriated water of a natural stream, either by or without incorporation; but neither the company nor any stockholder therein can thus withhold the water from beneficial use, nor reserve it for future use by junior appropriators, to the prejudice of prior appropriators, nor to the exclusion of those who, in the mean time, undertake, in good faith, to make a valid appropriation thereof.

WATERS — **RIGHTS OF DITCH-OWNERS TO.** — Those who, by labor or the payment of money, actually construct an irrigation ditch may thereby acquire a prior right to the water diverted therein, provided they apply such water to some beneficial use, within a reasonable time after diversion; but they cannot postpone the exercise of such right for an unreasonable time, so as to prevent others from acquiring a right to the water; nor can they thus acquire a right to dispose of the water to the prejudice of prior appropriators.

WATERS — **RIGHTS OF DITCH-OWNERS TO.** — Those who construct ditches and divert water for general purposes of irrigation must, within a reasonable time, apply the water to a beneficial use, or upon proper application, and for proper consideration, they must dispose of it to those who are ready to make a beneficial use of it.

WATERS. — **DIVERSION OF WATER** without applying it to a beneficial use within a reasonable time is not an appropriation thereof, but is unconstitutional and unlawful.

WATERS — **OWNERSHIP OF STOCK IN IRRIGATION COMPANY NOT APPROPRIATION.** — Priority of appropriation of water cannot be secured by the mere acquisition of stock in an irrigation company without applying the water to a beneficial use. The life of a prior right to water is actual use, and the owner of irrigation stock cannot carry prior rights to the use of water in his pocket for an indefinite and unreasonable time, and thereby prevent others from acquiring a *bona fide* priority by actual use.

WATERS — **OWNERSHIP OF WATER STOCK, WHEN GIVES PRIOR RIGHT.** — A stockholder in an irrigation company who makes an actual application of water from the company's ditch to a beneficial use may, by means of such use, acquire a prior right thereto; but his title to the stock without such use gives him no title to the priority. He may transfer his stock to any one, but he can only transfer his priority to one who will and does continue to so use the water.

WATERS CANNOT BE DIVERTED FOR PURPOSES OF SPECULATION, but only for purposes truly beneficial in their nature.

WATERS — **PRIOR APPROPRIATOR NOT ENTITLED TO EXCESSIVE DIVERSION.** — A prior appropriation of water by a person for irrigation purposes does not entitle him to receive more water than is necessary for his actual

use. An excessive diversion of water is not a diversion to a beneficial use.

WATERS—RIGHTS TO, HOW DETERMINED.—Mathematical exactness in measuring the flow of water is impracticable, and cannot be attained; but a reasonable approximation to substantial accuracy should be aimed at in determining controversies relating to water supply.

WATERS—CONSUMER'S RIGHT CANNOT BE REGULATED BY WATER COMPANY.—The right of individual consumers, upon tender of the carriage fee, to water diverted by an irrigation company, and not already applied to a beneficial use, can no more be evaded or qualified by a regulation of the company compelling the purchase of stock as a condition precedent to use, than it can by a regulation fixing a sum in excess of the price charged for carriage to be thus paid for the use of water.

Leiper and Johnson, and T. J. O'Donnell, for the appellant.

Markham and Dillon, for the appellee.

ELLIOTT, J. The writ of *mandamus* has been held to be an appropriate remedy to compel the delivery of water for purposes of irrigation. In the case of *Golden Canal Co. v. Bright*, 8 Col. 144, a judgment awarding the writ was reviewed upon error in this court and affirmed. In the case of *Wheeler v. Northern Colorado Irr. Co.*, 10 Col. 582, 3 Am. St. Rep. 603, a judgment denying the writ was reviewed upon appeal by this court and reversed. In the latter case, however, the appeal was prosecuted under the special appeal acts of 1885: Sess. Laws 1885, p. 350.

Whether judgments in cases of this kind are appealable under the code of 1887 may, in some cases, be a matter of much practical importance. Upon reaching this cause for consideration, we suggested a hearing *in limine*, upon the question of the right of appeal; but counsel for appellee did not present any brief or argument upon the point. Under the circumstances, we have concluded to consider the case as though the judgment related to a franchise: Code, sec. 388. The decision, however, is not to be taken as a precedent upon that question. There may be good reasons why appeals in cases of this kind should not be allowed which could not be urged against a review by writ of error.

Upon this review the vital questions are: 1. Was such a state of facts established upon the trial as entitled the petitioner, Combs, to have the defendant ditch company supply him with water for the irrigation of his land, as demanded in his petition? 2. Was any substantial error committed upon the trial by which the petitioner may have been prevented from establishing his claim to the relief demanded?

Under the constitution and laws of this state, a ditch company carrying water for general purposes of irrigation cannot arbitrarily refuse to supply water to an actual and *bona fide* consumer, making seasonable application, and offering proper compensation therefor. A refusal to supply water by the carrier, to be justifiable, must rest upon something more substantial than the mere will of the carrier. The constitutional rule that "priority of appropriation shall give the better right, as between those using the water for the same purpose," must never be overlooked, though a variety of circumstances and conditions may have to be taken into consideration in determining the claim of an applicant for water in a given case.

That the petitioner, Combs, was in the occupancy of certain agricultural lands so located as to be conveniently supplied with water from the defendant's ditch, that he requested the defendant to supply him with water necessary for the irrigation of said lands for the season of 1888, and tendered therefor the price fixed by the board of county commissioners, and that the defendant refused to deliver the water, are matters that were either admitted or practically undisputed on the trial.

The defendant attempted to justify its refusal to deliver the water upon the ground that by the declared objects of its incorporation it was a mutual company; that it was not organized for the purpose of carrying water for others for hire; that its only obligation in the matter of carrying water was to supply its stockholders. An inspection of the certificate by which the Agricultural Ditch Company was incorporated, as introduced upon the trial, does not sustain this ground of defense. The certificate shows that the company was organized under the general incorporation act, by certain settlers living in the arid district of Jefferson and Arapahoe counties, territory of Colorado, unprovided with water, for the purpose of irrigation, stock-raising, aiding the industrial interests of the country, and other purposes. The certificate further shows "that the objects for which this company is incorporated are to irrigate lands situate in range 69, townships 3 and 4, and other lands in Jefferson and Arapahoe counties, and territory of Colorado, and for farming, stock-raising, and other purposes; that the capital stock of said company shall be twenty thousand dollars, to be divided into two hundred shares of one hundred dollars each."

There is nothing in the certificate to indicate that it might

not be the legitimate business of the defendant company to carry and supply water for irrigation generally to those occupying lands within the vicinity of the ditch. Hence we do not have to consider whether a purely mutual company might or might not stand on a different footing.

The defendant offered to introduce in evidence certain of its by-laws, as follows: "1. No water shall be sold from the company's ditch, except to stockholders; 2. The price of water shall always be as low as is consistent with the permanent maintenance of the ditch; 3. No cash dividend shall be declared on the stock of the company."

Such testimony, if it had been admitted, would not have been controlling. A ditch company diverting water from a natural stream for general purposes of irrigation cannot, by any provision or declaration of its by-laws, rules, or regulations, exempt itself or its stockholders from the operation of the state constitution. The unappropriated waters of every natural stream belong to the public, and are subject to appropriation by the people to beneficial use. Priority of appropriation to actual beneficial use, and not mere ownership of stock in a ditch company, gives the better right to such use.

Individuals may organize a company, either by or without incorporation, for the construction of an irrigating ditch, and may by such means divert the unappropriated waters of a natural stream. They may provide that their several interests in such enterprise shall be represented by shares of stock. But neither the company nor any stockholder of the company can thus withhold the water from beneficial use, nor reserve it for the future use of junior appropriators, to the prejudice of prior appropriators, nor to the exclusion of those who in the mean time may undertake, in good faith, to make a valid appropriation thereof. Undoubtedly, those who, by labor or by the payment of money, actually construct an irrigating ditch may thereby acquire a prior right to the water which may be diverted therein, provided they apply the same to beneficial use within a reasonable time after such diversion. But they cannot postpone the exercise of such right for an unreasonable time, so as to prevent others from acquiring a right to the water; nor can they thus acquire a right to dispose of the water contrary to the priority rule. Those who construct ditches and divert water for general purposes of irrigation must, within a reasonable time, apply the water to beneficial use; or else, upon proper application and for proper

consideration, they must dispose of the same to those who are ready to make beneficial use of it. If ditch companies are unwilling to be charged with such duties and responsibilities, they must leave the water in the natural stream. The mere diversion of the water is not an appropriation of it within the meaning of the constitution; there must be an application of the water to beneficial use within a reasonable time, or the diversion is unlawful: See *Farmers' High Line etc. Co. v. Southworth*, 13 Col. 111, and cases there cited.

The case of *McFadden v. County of Los Angeles*, 74 Cal. 571, cited and relied upon by counsel for defendant in error, is not in point in this case. The question involved related to a mutual company. It does not appear that any question of priority of right to the use of water was involved; no such question was discussed in the opinion; nor does the provision of the California constitution referred to in the opinion relate to the subject of prior rights.

In a carefully considered opinion recently delivered by Mr. Justice Hayt in the case of *Strickler v. City of Colorado Springs*, 16 Col. 61, 25 Am. St. Rep. 245, this court held that a "priority to the use of water for irrigation is a property right, and may be sold and transferred separately from the land in connection with which the right ripened." It must not be inferred from this language that such priority may be secured by the mere acquisition of stock in an irrigating company without applying the water to beneficial use. An owner of irrigating stock cannot thus carry prior rights to the use of water in his pocket for an indefinite or unreasonable time, and thereby prevent others from acquiring a *bona fide* priority by actual use.

The ownership of a prior right to the use of water is essentially different from the ownership of stock in an irrigating company. The ownership of the stock, like the title to other property, may be acquired by descent or purchase; the ownership of the prior right can be acquired originally only by the actual beneficial use of the water. The very birth and life of a prior right to the use of water is actual user. A stockholder in an irrigating company who makes an actual application of water from the company's ditch to beneficial use may, by means of such use, acquire a prior right thereto; but his title to the stock without such use gives him no title to the priority. He may transfer his stock to whom he will, but he can only transfer his priority to some one who will

continue to use the water. If the law were to be declared otherwise, — if ditch companies were at liberty to divert water without limit, and at the same time make the ownership of stock an absolute condition precedent to the right to procure water from their irrigating canals, — water rights would soon become a matter of speculation and monopoly, and tillers of the soil would have to pay exorbitant rates for the use of water, or our arid land would become unproductive. The constitution provides that the water of natural streams may be diverted to beneficial use; but the privilege of diversion is granted only for uses truly beneficial, and not for purposes of speculation. This is evident from the fact that provision is made for establishing reasonable rates to be charged for the use of water by individuals or corporations furnishing the same, the evident purpose of which is, that actual and beneficial consumers of water may not be subjected to extortionate demands.

Speaking upon this subject, Mr. Justice Helm, in the case of *Wheeler v. Northern Colorado Irr. Co.*, 10 Col. 582, 3 Am. St. Rep. 603, used the following pertinent language: "Any unreasonable regulations or demands that operate to withhold or prevent the exercise of this constitutional right by the consumer must be held illegal, even though there be no express legislative declaration on the subject."

One witness for the defense testified that the water "was prorated according to the shares." The substance of his testimony was, that the capital stock of the company consisted of two hundred shares; the ditch carried about six thousand inches of water; hence the stockholders were entitled to use or control the use of thirty inches of water for each share of stock owned by them respectively. That this was the logic of his testimony was indicated by a remark of the trial judge, during the introduction of the testimony, as follows: "Let me see if I have got this correct. The number of inches of water that any person was entitled to was in accordance with the number of shares that such person had, and not as to the number of acres of land that he had to cultivate."

It is not clear, however, that the trial court sanctioned such erroneous view of the law; nor did the defendant rest its defense altogether upon such ground.

In so far as the defense was placed upon the ground that the stockholders were actual prior appropriators of water from the ditch to beneficial use, as explained in this opinion, the

defense was proper; and if, as a matter of fact, the actual appropriations of water by the stockholders were prior to the application of the petitioner, and if their appropriations were equal in the aggregate to the whole amount of water carried by the ditch, the application of the petitioner was properly refused. If, on the other hand, there was a surplus of water remaining in the ditch after supplying prior appropriators, the petitioner was entitled to be supplied out of such surplus.

The legal theory upon which a case of this kind should be tried is very simple, however difficult it may be to apply the law to the evidence. It is plain that the quantity of land and the character of the soil which the appropriators of water from the ditch have under cultivation, as well as their actual prior appropriations of water to the irrigation of such lands, and not the number of shares of stock they may own, are the important matters to be considered in determining such a controversy. In the trial of such an issue, it is also important to observe that no matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use. An excessive diversion of water cannot be regarded as a diversion to beneficial use within the meaning of the constitution. Water, in this country, is too scarce, and consequently too precious, to admit of waste. The constitutional rule of distribution, "first come, first served," does not imply that the prior appropriator may be extravagantly prodigal in dealing with this peculiar bounty of nature. We are aware that it may not be practicable to attain mathematical exactness in measuring the flow of water; but a reasonable approximation to substantial accuracy should be aimed at in determining controversies relating to water supply.

Another witness for the defense, upon his examination in chief, was asked this question: "From your experience as a farmer, and in irrigation in connection with it, is there water enough in that ditch now, or has there been for the last two years, to irrigate the lands which have heretofore been irrigated by that ditch?" This question was objected to, — 1. On the ground that it did not appear that the witness had knowledge; and 2. Because the matter embraced in the question was the question then at issue and on trial. The objection was overruled. The ruling was excepted to, and is assigned for error. Without noticing the first ground of objection, it is clear that the objection was well taken upon the

second ground, and should have been sustained. The question was not merely introductory; it embraced the very substance of the issue which the court was then trying; and a categorical answer, such as the question called for, would, if accepted by the court, have been a complete determination of the issue. It is an elementary rule that such questions are inadmissible. We are aware that direct questions are not always to be regarded as objectionable; there are exceptions to the rule, but certainly the foregoing is not one of them. The answer in this case, though not very direct, was of such a sweeping, general, and argumentative character that it is impossible to say that its effect upon the mind of the court was harmless. Counsel should not have taken the risk of such a question. The objection, having been interposed in apt time and terms, should have been heeded, and the question withdrawn or modified: 2 Best on Evidence, sec. 641; 1 Wharton on Evidence, sec. 499, and notes; 2 Phillips on Evidence, sec. 889, and notes.

There was an effort on the part of the petitioner to establish a priority of right to water from the defendant's ditch as the successor of one Edwards, who had previously owned petitioner's land. Edwards had procured water from the ditch for said land during the irrigating season of 1884 and a part of the season of 1885, by contract with the company. For the season of 1886 he procured the water in connection with water for other land, and it does not appear that the ditch company had knowledge that the water was used except for the other land. Edwards sold the land in 1887, and it was not cultivated during that year. The petitioner came into possession of the land early in 1888; and it is assumed that he succeeded to the prior rights of Edwards to the use of water from the ditch. The evidence in the record concerning petitioner's alleged priority through Edwards is so unsatisfactory that we do not undertake to consider it for any purpose. Our opinion is based upon the application of the petitioner for the irrigating season of 1888, as though that were the beginning of his claim; and while it is by no means certain that he was entitled to the water, as claimed, for that year, it appears that there was error on the trial which may have affected his substantial rights in the determination of the proceeding.

In accordance with the foregoing views, the judgment of the district court is reversed, and the cause remanded. As was held in *Wheeler v. Northern Colorado Irr. Co.*, 10 Col. 582,

3 Am. St. Rep. 603, this was a proceeding by petitioner to obtain relief for a particular year merely. Hence the petitioner cannot gain anything by a new trial. It is therefore ordered that he be allowed to dismiss his action without prejudice.

HELM, C. J. (concurring). If I correctly understand the foregoing opinion, it rests the decision of the main point exclusively upon the constitutional obligation of carriers organized for the purpose of conveying water to consumers generally. It does not declare or define the rights or obligations existing between stockholders in what may, for convenience, be termed mutual ditch companies, or between such companies and consumers in no way connected therewith. By the phrase "mutual ditch companies" I mean associations formed by consumers for the purpose of conveying water solely to irrigate their own lands, and not for hire; these associations may or may not be incorporated, and the respective interests of the members may or may not be represented by stock. I agree with the conclusion reached by Mr. Justice Elliott, that the constitutional right of individual consumers, upon tender of the carriage fee, to water diverted by a carrier, and not already applied to beneficial uses, can no more be evaded or qualified by a regulation compelling the purchase of stock as a condition precedent to use, than it can by a regulation fixing a sum in excess of the price charged for carriage, to be thus paid for the constitutional right of user: *Wheeler v. Northern Colorado Irr. Co.*, 10 Col. 582; 3 Am. St. Rep. 603. I do not understand that my associate intends to suggest views touching the constitutional *status* or rights of the members of mutual companies as to each other, or as to outside consumers, and thus anticipate a question treated by the opinion as not now fairly before us.

WATERS — RIGHT OF DITCH-OWNER TO WATER. — When the right to the use of a ditch and water exists in favor of land conveyed by deed, and without which the land would be practically useless, and was perhaps the main inducement to the purchase, it will pass by the deed, without express words to that effect: *Simmons v. Winters*, 21 Or. 35; 23 Am. St. Rep. 727, and note. But an incorporated ditch company owning lands adjacent to a stream of water cannot deprive an upper riparian proprietor, through whose land a natural stream of water flows, of his right to use his land in a reasonable manner without making due compensation for his water right, though such use causes a serious pollution of the stream: *Helfrich v. Catonsville Water Co.*, 74 Md. 269; 23 Am. St. Rep. 245.

WATERS — RIGHTS OF PRIOR APPROPRIATORS. — Priority of appropria-

tion of water in point of time gives superiority of right among appropriators for like beneficial purposes: *Strickler v. Colorado Springs*, 16 Col. 61; 25 Am. St. Rep. 245, and note; *Hasamond v. Ross*, 11 Col. 524; 7 Am. St. Rep. 258, and note.

WATERS — RIGHT TO DIVERT WATER — FOR WHAT PURPOSES. — To constitute a valid appropriation of water, it is required to be made for some beneficial purpose then existing or contemplated, and the amount appropriated must be restricted in quantity to the amount needed for such purpose: *Simmons v. Winters*, 21 Or. 35; 28 Am. St. Rep. 727, and note; *Clark v. Pennsylvania R. R. Co.*, 145 Pa. St. 438; 27 Am. St. Rep. 710, and note. See note to *Alta Land etc. Co. v. Hancock*, 20 Am. St. Rep. 225. A riparian owner may withdraw the water of a stream by ordinary means or artificial channels to supply the wants of men and animals to such an extent as to materially lessen the flow, yet it cannot be withdrawn for the purpose of irrigation or any other artificial purpose except in such a reasonable way as not to interfere unjustifiably with its general use: *Anderson v. Cincinnati etc. Ry.*, 86 Ky. 44; 9 Am. St. Rep. 263, and note.

GREENWOOD CEMETERY LAND COMPANY v. ROUTT.

[17 COLORADO, 156.]

MANDAMUS AGAINST GOVERNOR. — The official discretion of the governor of a state cannot be controlled by *mandamus*. This writ will be allowed in a proper case to command action, but it cannot be used to control discretion.

MANDAMUS AGAINST GOVERNOR. — The writ of *mandamus* will not lie to control the action of the governor of a state in the exercise of any of his political or governmental powers, whether such powers are conferred upon him by the constitution or by statute.

MANDAMUS AGAINST GOVERNOR — WHEN WILL LIE. — When, in the exercise of some official power neither political nor essentially governmental, the law specially enjoins upon the governor of a state as a duty the performance of some particular act, under circumstances in which he has no discretion, and his refusal to perform the act deprives a party of his property or of some legal right, *mandamus* will lie against the governor to compel the performance of such ministerial act, in the absence of other plain, speedy, or adequate remedy at law.

MANDAMUS AGAINST GOVERNOR TO COMPEL ISSUANCE OF LAND PATENT. — *Mandamus* will lie against the governor of a state to compel him to perform a merely ministerial act in signing, executing, and delivering a patent to public land, which has been regularly sold by the state board of land commissioners of which he is a member, provided the purchaser has paid or tendered the full purchase price, and has otherwise complied with all conditions of the purchase.

MANDAMUS AGAINST LEGISLATURE. — The members of the legislative department of a state cannot be directly controlled by *mandamus* in the exercise of their legislative powers.

CONSTITUTIONAL LAW. — LEGISLATIVE, EXECUTIVE, AND JUDICIAL DEPARTMENTS of state government are distinct from each other, and, so far as

any direct control or interference is concerned, are independent of each other; but the power of either department is not absolute, and may be incidentally affected by the action of another department. Each department is a check upon the exercise of arbitrary power by another department.

MANDAMUS against John L. Routt, governor of Colorado, and others, comprising the state board of land commissioners of that state, to compel them to sign, execute, and deliver a patent to certain public lands purchased by the petitioner.

Hartzell and Patterson, and Riddell, Starkweather, and Dixon, for the appellant.

J. H. Maupin, attorney-general, and H. B. Babb, for the appellees.

ELLIOTT, J. The defendants, by a separate and distinct plea, incorporated in their answer, challenged the jurisdiction of the court to issue the writ of *mandamus* against the governor. Such plea, being in the nature of a demurrer to the petition, was, by consent of the parties and the court, treated as raising a question of law to be considered and disposed of in advance of any trial that might become necessary upon other matters of defense stated in the answer.

Upon the hearing, the demurrer was sustained, and the writ of *mandamus* denied solely on the ground of a want of jurisdiction in the court to issue the writ against the governor. No other matter contained in the answer was considered or determined by the district court. The review upon this appeal must accordingly be limited to the technical legal question of jurisdiction.

It may be here remarked that the jurisdictional question could not have been avoided by applying in the first instance to this court for the exercise of its original jurisdiction, inasmuch as by the express terms of the constitution (art. 6, sec. 11) the district courts are invested with original jurisdiction of all causes, both at law and in equity.

It is an elementary rule that a demurrer admits the truth of all allegations of fact in the pleading demurred to, so far as the same are well pleaded. No objection, other than the jurisdictional one above stated, having been taken to the sufficiency of the petition, either as to matters of form or substance, we are justified in assuming, for the purposes of this opinion, that the facts stated in the petition are not only true, but that they are sufficient in substance to entitle the petitioner to

relief by *mandamus*, but for the fact that such relief is asked against the governor.

The course of proceeding adopted for disposing of this litigation in the district court virtually compels this court to decide whether the writ of *mandamus* may issue against the governor, under the circumstances set forth in the petition, as though no defense had been interposed upon the merits.

The question is an exceedingly delicate one; and it is with reluctance that we undertake its decision. Nevertheless, as the question is properly presented by the record, it is unquestionably the duty of this court to pass upon and determine the same according to our best judgment. The isolated form in which the question is presented will at least relieve us from the charge of *obiter dictum*, or of delivering an unnecessary opinion upon the subject.

Under what circumstances, if at all, may the action of the chief executive of the state be controlled by *mandamus* or other judicial process? This question has been a fruitful source of controversy in several of our sister states. Some phases of the question are easy; and up to a certain point, the decisions are in substantial accord. As to other phases, the most diverse views have been expressed; and it would be exceedingly difficult to trace the current of judicial opinion or to determine the weight of authority. After much consideration, without commenting at length upon the various decisions, and without attempting to reconcile authorities, we shall briefly state our own views, and endeavor to place the decision upon those principles of right and justice recognized and established by our free constitutional government.

It is scarcely necessary to say that the official discretion of the governor cannot be controlled by *mandamus*. This court has repeatedly announced the general rule, that while the writ may, in a proper case, be allowed to command action, it will not be used to control discretion: *Union Colony v. Elliott*, 5 Col. 373; *People v. District Court*, 14 Col. 396; *People v. Graham*, 16 Col. 347.

The authorities are uniform that the courts cannot, by *mandamus*, control the action of the governor in the exercise of any of his political or governmental powers, whether the same are conferred by the constitution or by legislative enactments. In the exercise of political and governmental powers the governor is independent, or, at most, is answerable only to the high court of impeachment, or, as in the case of other elective

officers, to the people: Mechan on Public Officers, secs. 954 et seq.

But may not the governor be invested with certain powers and duties, in the exercise of which, under certain circumstances, he may have no discretion, — powers and duties which are neither political nor governmental in their nature, — powers and duties which might have been devolved upon some other officer or person, — powers and duties pertaining to transactions of a purely business or financial character, and in which the specific rights of private persons, as well as the rights of the public, may be involved? Strange to say, in response to questions like the foregoing, some difference of judicial opinion has been expressed; but the greater number of opinions, and opinions which seem to us sustained by the better reason, concur in an affirmative answer.

Without further comment at this juncture, let us proceed to further inquiries bearing more directly upon the subject under investigation. If, in the exercise of some official power neither political nor essentially governmental, the law specially enjoins upon the governor as a duty the performance of some particular act, under circumstances in which he has no discretion, and he refuses to perform the act, and by his refusal a private individual is deprived of his property or other legal right, is there no remedy? And further, if there be no plain, speedy, and adequate remedy in the ordinary course of law, is the injured party to be denied redress by *mandamus* for the sole reason that the party committing the injury is the governor of the state?

Prominent among the objections urged why the governor should not be held subject to judicial process seeking to control his official action in any case, is, that by article 3 of the constitution the governmental powers of the state are divided into three distinct departments, — the legislative, executive and judicial, — and that no person or collection of persons charged with the exercise of powers properly belonging to one of these departments is allowed to exercise any power properly belonging to either of the others, except as the constitution expressly directs or permits, and that by article 4, section 2, the supreme executive power of the state is vested in the governor.

We have already indicated that the governor, as chief executive, cannot be directly controlled in the exercise of his political or governmental powers by judicial process. As to

matters properly pertaining to the executive department, he is independent, and may act or refuse to act, according to the dictates of his own judgment. It is scarcely necessary to say that members of the legislative department cannot be directly controlled in the exercise of their legislative powers by any judicial process. The legislature cannot be thus compelled to pass an act, even though the constitution expressly commands it, nor restrained from passing an act, even though the constitution expressly forbids it. The judicial department of the state government is also charged with the duty of expounding and construing both the constitution and laws of the state, and with hearing, trying, and determining suits and controversies affecting both public and private rights. Within its appropriate sphere the judiciary is independent; its legitimate province cannot be invaded by others, nor can it properly evade its own responsibilities.

Thus the departments are distinct from each other, and so far as any direct control or interference is concerned, are independent of each other. More, they are superior in their respective spheres. Nevertheless, indirectly, or perhaps it should be said incidentally, by the action or non-action of one department, the powers of the other departments may be more or less affected. The governor may refuse to exercise some of his governmental or political powers, or may exercise them in such a way as to embarrass the other departments. The legislature, by passing or refusing to pass certain laws, may affect both the executive and judicial departments. So the judiciary, in passing upon a statute which has received both legislative and executive approval, may give it a construction different from what its authors intended, thus affecting, or perhaps defeating, its operation. Thus it appears that the different departments, though separate, distinct, and independent to a certain extent, are by no means absolute. The distribution of governmental powers to different departments was obviously intended as a check upon the exercise of arbitrary power by any department; thus a government of balanced powers was established, with checks and counter-checks for the better protection of society and the better security of private rights and individual interests.

Before it can properly be held that the court is without jurisdiction to control the governor in the matter of signing the patent, it must appear that the governor's action in the premises is discretionary, or that it properly pertains to the

executive department of the government as one of his governmental or political powers, or else it must appear that the subject-matter of the litigation is not within the sphere or class of powers properly belonging to the judicial department.

First, it may be observed that the act which petitioner in this section asks that the governor may be required to perform is not devolved upon the governor by the executive article of the constitution. Article 9 of the constitution, entitled "Education," provides that the governor, superintendent of public instruction, secretary of state, and attorney-general shall constitute the state board of land commissioners, and that they shall have the direction, control, and disposition of the public lands of the state, under such regulations as may be prescribed by law.

By the act of April 2, 1887, it is provided that a majority of the land board shall constitute a quorum for the transaction of business; that the governor shall be president of the board, but that in his absence from any meeting, the board may elect one of its members president *pro tempore* to preside at such meeting; the board may also appoint a register, not a member, whose duties, among other things, shall be to have the custody of its records and seal.

By an amendment to the act of 1887, *supra* (Sess. Laws 1891, p. 257), it is provided that the purchaser of any state land may make full payment at any time; and that whenever a purchaser "has complied with all of the conditions of the sale, and paid all purchase-money, with the lawful interest thereon, he shall receive a patent for the land purchased; such patent shall be signed by the governor, and countersigned by the register, attested with the seal of the state board of land commissioners; and when so signed, such patent shall convey a good and sufficient title in fee-simple."

From the foregoing it will be seen that the governor is one of four members constituting the state board of land commissioners; the constitution confers upon him no greater power or authority than either of the other members. By making the governor president of the board, the statute gives him no authority over the other members; by providing that a majority of the board shall constitute a quorum, the other three members, if agreed, may act without the governor's concurrence. In like manner, the signing of the patent is a duty which might have been devolved upon any other member of the board, or upon all or upon a majority of them; it is a duty which, by the

express and unequivocal terms of the statute, depends upon the full completion of certain acts to be performed by the board on the one part, and by the purchaser on the other; it can only be required when the acts, of which the patent is the appropriate evidence, have already been fully and completely performed by the contracting parties.

The statute requires the board to exercise its discretion as to the time when any parcel of school land shall be offered for sale; its discretion may also be required in the fixing of the minimum price and other particulars; but such discretion is to be exercised by the land board in its collective capacity, and not by the governor individually. The discretion and power of the land board, being vested in the members collectively, cannot therefore be held to be included in the supreme executive power, which is, by the constitution, vested alone in the governor: Const., art. 4, sec. 2.

The land board having determined to sell, and having taken the steps necessary to that end, the statute is very specific as to the manner in which the sale shall be conducted. The rights of purchasers and of the state are carefully guarded as to the amount, time, and mode of payments, the application of the purchase-money, the evidences of sale to be given to purchasers, and other details.

No one can carefully read the statute regulating the sale of public lands without reaching the conclusion that it was intended to place the proceedings of the land board in conducting such sales upon a purely business basis; there is nothing of a political nature or of a discretionary character in the duties of the board, or of any member or officer thereof, in the matter of conducting such sales, or in their subsequent dealings with purchasers; the transactions are commercial, rather than political or governmental. The land having been duly offered for sale, and the proceedings having been conducted and the land sold as the statute provides, the duties of the board thereafter in reference to the land so sold are wholly ministerial.

We must not be understood as intimating that after offering the land for sale the board may not thereafter withdraw the same from the market before the rights of third parties have attached. But if, as by the demurrer in this case we are to suppose, the land has been sold, and the purchaser and his assignee have invested over fifteen thousand dollars in the purchase, over thirteen thousand dollars of which has been

paid into the state treasury, and the residue to the owner of the surface improvements, as the law directs,—if the purchaser or his assignee has fully complied with all the conditions of the sale, and tendered full payment of the balance of the purchase-money as the law permits,—if the sale has in fact been thus actually and in good faith consummated, it would seem strange if the law would permit the land board, or any officer thereof, to obstruct the rights of the purchaser or his assignee in the premises. A refusal to execute the patent, under such circumstances, would greatly embarrass the petitioner in the enjoyment of the land thus purchased, and perhaps cause the loss thereof altogether by withholding the instrument which the statute provides shall convey a “good and sufficient title in fee-simple.”

To the argument that the court cannot compel the execution of the patent because its mandate cannot be issued against the governor, it may be replied, that the same section of the constitution which vests “the supreme executive power of the state” in the governor also provides that he shall “take care that the laws be faithfully executed.” Besides, it cannot be gainsaid that the determination of suits and proceedings involving rights to property is peculiarly within the province of the judicial department; it is the duty of the courts, upon proper presentation of such matters, to hear, and determine, and give judgment, as the law directs. The general rule is, that private rights must be regarded, irrespective of the parties to the controversy. When the governor has had his day in court in a suit or action with a private citizen in a matter affecting a specific vested right of the latter, and not involving the political, governmental, or other discretionary power of the former, and the action is finally determined in favor of the citizen, there can be no doubt that it is the duty of the governor, the same as any other party, to yield obedience to the judgment of the court.

The argument which has been strongly urged in some cases, though not in this, that the court should not declare the law nor give judgment in a case of this kind against the governor, because the governor, as commander-in-chief of the military, might resist, is based upon a very improbable contingency; such an argument is alike discreditable to the executive and to the judiciary of a free and enlightened state. The governor would have no more right, nor do we believe he would have any more inclination, in a case of this kind, to resist the mandate

of the court, than in a case in which he, as a private citizen, might be a party, or, for that matter, in a case in which he might not be personally connected with the litigation. In any event, the judiciary cannot properly shrink from its duty. Every person in the state, whatever his rank or station, is entitled to the equal protection of the laws; every person is also subject to governmental authority; and the courts are charged with the responsibility of declaring the law applicable to any and all controversies, properly presented, according to their best judgment, to the end that the rights of all persons may be protected and their grievances redressed.

Perhaps we should not conclude this opinion without more direct reference to what others have said upon this subject. In an elaborate opinion delivered many years ago, Chief Justice Marshall, of the supreme court of the United States, declared: "It is not by the office of the person to whom the writ is directed, but by the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined."

Notwithstanding this proposition has been characterized as *obiter*, it has served as the text for numerous judicial decisions, state and federal. Its acceptance is doubtless attributable in some degree to the great eminence of its author as a constitutional lawyer and jurist, but more particularly, we think, to the fact that it so clearly and correctly announces the legal principle applicable to proceedings by *mandamus* against public officers under republican forms of government.

In an able opinion by Mr. Justice Cooley, of the supreme court of Michigan, it is said: "In many cases it is unquestionable that the head of an executive department may be required by judicial process to perform a legal duty, while in other cases, in our judgment, the courts would be entirely without jurisdiction; and as regards such an officer, we should concede that the nature of the case and of the duty to be performed must determine the right of the court to interfere in each particular instance."

This language is a practical admission of the principle announced by Marshall, so far as all executive officers, save the chief executive, are concerned. But in the same opinion, Judge Cooley gives, among other reasons for excepting the governor in all cases, the following: "There is no very clear and palpable line of distinction between those duties of the governor which are political and those which are to be con-

sidered ministerial merely; and if we should undertake to draw one, and to declare that in all cases falling on one side the line the governor was subject to judicial process, and in all falling on the other he was independent of it, we should open the doors to an endless train of litigation, and the cases would be numerous in which neither the governor nor the parties would be able to determine whether his conclusion was, under the law, to be final, and the courts would be appealed to by every dissatisfied party to subject a co-ordinate department of the government to their jurisdiction."

With great respect for the distinguished jurist and author, we are constrained to say that the grounds of exemption thus stated do not meet the approval of our judgment; the reasoning seems to be at variance with common experience, and contrary to the principles underlying the judicial systems of this country. Courts are constantly called upon to decide cases in which the line of distinction is not very clear or palpable. The doors of litigation are already wide open, and must constantly remain so in a free government. Numerous cases are brought, and the courts are constantly appealed to by dissatisfied parties in an almost endless variety of cases. Litigation unquestionably increases as society advances. With the progress of civilization, with the increase of wealth and population, with new discoveries and inventions, new fields for judicial inquiry are opened for exploration. With the multiplied wants, desires, and aspirations of an enlightened but aggressive race, rapidly increasing in numbers, and thereby coming in closer contact, and often in conflict, with each other, new and difficult questions in respect to their legal and equitable rights will arise, resulting in legal controversies which will be unceasingly pressed upon the consideration of the courts until they are determined by the highest judicial authority within the reach of litigants.

But the courts cannot, because of the increase of litigation, shut the door against litigants applying for an adjudication of their controversies. These controversies are frequently due to an honest misapprehension as to the rights of the respective litigants. The majority of our people who may be engaged in litigating their honest differences will generally acquiesce in the decisions of the highest judicial tribunal of their country, without serious complaint, when substantial reasons for the decisions are fairly stated; but they will not be satisfied by an arbitrary rule which precludes them from having

their differences heard and determined upon the merits; and especially will they not be satisfied when such arbitrary rule rests upon nothing more substantial, or more acceptable to a free citizen, than the official rank or dignity of the adverse party.

Want of time and space forbids further comment upon the decisions cited by counsel in their excellent briefs. The following are some of the authorities which have been considered in the preparation of this opinion: *Marbury v. Madison*, 1 Cranch, 170; *People v. Governor*, 29 Mich. 320; 18 Am. Rep. 89; *Middleton v. Low*, 30 Cal. 596; *State v. Chase*, 5 Ohio St. 528; *Martin v. Ingham*, 38 Kan. 641; *Magruder v. Swann*, 25 Md. 209; *Gray v. State*, 72 Ind. 567; *Smith v. Myers*, 109 Ind. 1; 58 Am. Rep. 375; *Mott v. Pennsylvania R. R. Co.*, 30 Pa. St. 33; 72 Am. Dec. 664; *Hartranft's Appeal*, 85 Pa. St. 443 et seq.; 27 Am. Rep. 667; *People v. Bissell*, 19 Ill. 229; 68 Am. Dec. 591; *State v. Warmoth*, 22 La. Ann. 1; 2 Am. Rep. 712; *State v. Governor*, 39 Mo. 388; 2 Dillon on Municipal Corporations, 3d ed., sec. 834; Moses on Mandamus, 80-84; High on Extraordinary Legal Remedies, secs. 118 et seq.; Mechem on Public Officers, secs. 954-956; Cooley on Torts, c. 1.

The language of this opinion in reference to the facts of the case is to be understood as based upon the theory, stated at the outset, that the facts, for the purpose of determining the legal question involved, are admitted by the demurrer; we express no opinion as to what may be the real facts or merits of the controversy.

Our conclusion is, that the district court erred in deciding that it did not possess the jurisdiction to hear and determine the cause upon its merits. The judgment is accordingly reversed, and the cause remanded.

Mandamus against Governor.*

THIS SUBJECT is exhaustively treated in the note to *Hawkins v. Governor*, 33 Am. Dec. 661-668, where all the cases upon this vexed topic in existence at the time of that writing were cited and freely commented upon. It is not our intention to again go over the ground there covered, except so far as may be necessary in the examination of the later authorities. The question of how far the governor of a state is subject to the supervisory control of

*** REFERENCE TO MONOGRAPHIC NOTES.**

Mandamus against governor: 33 Am. Dec. 361-363.

Mandamus against legislative acts: 18 Am. Dec. 238-241.

Mandamus to control exercise of discretion: 93 Am. Dec. 375-377.

Mandamus to restore officer unlawfully removed: 12 Am. Dec. 23-31.

Mandamus, when will be granted: 51 Am. Rep. 738-801.

the courts, through the writ of *mandamus*, is one of importance and delicacy, upon which the authorities are to some extent in direct conflict.

Mandamus to Control Discretion. — As is well shown by the note above referred to, the government of each of the states is, by the constitutions thereof, divided into three co-ordinate branches, the executive, the legislative, and the judicial. Each of these branches is, within the sphere of its constitutional and governmental powers, independent and free from the control of the others. Within these limits, the legislative branch cannot control the judicial, nor can the judicial control the legislative nor the executive. The governor is, by the constitution, invested with certain important governmental or political powers and duties belonging to the executive branch of the state government, and the due performance of these duties is intrusted to his official honesty, judgment, and discretion. As to these purely executive or political functions devolving upon the chief executive officer of the state, and as to any other duties necessarily involving the exercise of official judgment and discretion, the doctrine is uncontroverted, and settled beyond the shadow of a doubt, that *mandamus* will not lie to control or compel his action. In other words, the action of the governor, in the exercise of his political or governmental powers, whether the same are conferred by the constitution or by statute, cannot be controlled by *mandamus*: *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346; *Tennessee etc. R. R. Co. v. Moore*, 35 Ala. 371; *State v. Warmoth*, 22 La. Ann. 1; 2 Am. Rep. 712; 24 La. Ann. 351; 13 Am. Rep. 126; *Mauran v. Smith*, 8 R. I. 192; 5 Am. Rep. 564; *People v. Governor*, 29 Mich. 320; 18 Am. Rep. 89; *Harpending v. Haight*, 39 Cal. 189; 2 Am. Rep. 432; *Berryman v. Perkins*, 55 Cal. 483; *Jonesboro etc. Turpicks Co. v. Brown*, 8 Baxt. 490; 35 Am. Rep. 713; *Baker v. Kirk*, 33 Ind. 517; *Miles v. Bradford*, 22 Md. 170; 85 Am. Dec. 643; *Magruder v. Swann*, 25 Md. 173; *Groome v. Gwinn*, 43 Md. 572; *Chamberlain v. Sibley*, 4 Minn. 309; *Chumaseo v. Potts*, 2 Mont. 242; *State v. Blandel*, 4 Nev. 241; *Cotten v. Ellis*, 7 Jones, 545; *State v. Chase*, 5 Ohio St. 528; *Low v. Towne*, 8 Ga. 360; *People v. Bissell*, 19 Ill. 229; 68 Am. Dec. 591; *People v. Yates*, 40 Ill. 126; *Dennett, Petitioner*, 32 Me. 508; 54 Am. Dec. 602; *State v. Governor*, 39 Mo. 388; *State v. Governor*, 25 N. J. L. 331; *State v. Moffitt*, 5 Ohio, 358; *State v. Champlin*, 2 Bail. 220; *Houston etc. R'y Co. v. Randolph*, 24 Tex. 317; all of which are cited in the note referred to, and to which may be added the later cases of *Rice v. Austin*, 19 Minn. 103; 18 Am. Rep. 330; *Vicksburg etc. R. R. Co. v. Lowry*, 61 Miss. 102; 48 Am. Rep. 76; *Gray v. State*, 72 Ind. 567; *Hovey v. State*, 127 Ind. 588; 22 Am. St. Rep. 663; *People v. Cullom*, 100 Ill. 472; *Western R. R. Co. v. De Graff*, 27 Minn. 1; *State v. Whitcomb*, 28 Minn. 50; *Hartranft's Appeal*, 85 Pa. St. 433; 27 Am. Rep. 667; *Martin v. Ingham*, 38 Kan. 641; *State v. Foster*, 38 Ohio St. 599; *State v. Board of Liquidation*, 42 La. Ann. 647; *Bates v. Taylor*, 87 Tenn. 319; *United States v. Blaine*, 139 U. S. 306.

Mandamus to Control Ministerial Act. — While the authorities are thus unanimously agreed that *mandamus* will not lie to control or compel the performance of an act by the governor when he is called upon to exercise a discretion in its performance, yet beyond this point the cases adjudicated in the courts of last resort in the different states are widely divergent, and in irreconcilable conflict as to whether, in any case, the writ of *mandamus* will issue to the chief executive officer of the state. Aside from the governmental, political, or discretionary powers and duties vested in the governor by the constitution or by statute, there is another class of powers and duties imposed upon him which do not necessarily belong to his office as part of the

functions to be performed by him, but which are created by express statute, and are merely ministerial in their nature. These duties in many, and in nearly all, instances might as well have been imposed upon any other of the state officers as upon the governor. Such duties are positive, and partake largely, if not entirely, of a purely ministerial character. It is as to these that the conflict of authority exists.

Authorities against its Use.—On the one hand, there is a large number, in fact the major part, of the cases which hold that *mandamus* will not lie against the governor to compel the performance by him of any act pertaining to his office, whether one involving his judgment and discretion, or one which is simply and purely ministerial in its character. These cases refuse to discriminate between those duties which are governmental or political in their character, involving discretion and judgment, and those which are ministerial, the performance of which are enjoined upon the governor by law, and in the performance of which no judgment or discretion need be exercised: *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346; *State v. Warmoth*, 22 La. Ann. 1; 2 Am. Rep. 712; 24 La. Ann. 351; 13 Am. Rep. 126; *State v. Board of Liquidation*, 42 La. Ann. 647; *Mauran v. Smith*, 8 R. I. 192; 5 Am. Rep. 564; *People v. Governor*, 29 Mich. 320; 18 Am. Rep. 89; *Jonesboro etc. Turnpike Co. v. Brown*, 8 Baxt. 490; 35 Am. Rep. 713; *Bates v. Taylor*, 87 Tenn. 319; *Vicksburg etc. R. R. Co. v. Lowry*, 61 Miss. 102; 48 Am. Rep. 76; *Low v. Towns*, 8 Ga. 360; *People v. Bisell*, 19 Ill. 229; 68 Am. Dec. 591; *People v. Yates*, 40 Ill. 126; *People v. Cullom*, 100 Ill. 472; *Dennett, Petitioner*, 82 Me. 508; 54 Am. Dec. 602; *Rice v. Austin*, 19 Minn. 103; 18 Am. Rep. 330; *State v. Dress*, 17 Fla. 67; *Western R. R. Co. v. De Graff*, 27 Minn. 1; *State v. Whitcomb*, 28 Minn. 50; *State v. Governor*, 39 Mo. 383; *State v. Governor*, 25 N. J. L. 331; *State v. Foster*, 38 Ohio St. 599; *Hovey v. State*, 127 Ind. 588; 22 Am. St. Rep. 663; *Hartranft's Appeal*, 85 Pa. St. 433; 27 Am. Rep. 667; *Houston etc. Ry Co. v. Randolph*, 24 Tex. 317. It will thus be seen that the courts in sixteen states, comprising Arkansas, Florida, Georgia, Illinois, Indiana, Louisiana, Maine, Michigan, Minnesota, Missouri, Mississippi, New Jersey, Ohio, Pennsylvania, Rhode Island, Tennessee, and Texas, adhere to the rule laid down above, and refuse to issue a *mandamus* to the governor of the state in any case.

Perhaps the leading case on this side of the controversy is that of *People v. Governor*, 29 Mich. 320; 18 Am. Rep. 89. In that case, a writ of *mandamus* was asked to compel the governor to perform a ministerial duty imposed upon him by statute, consisting in the issue of a certain land certificate when he was satisfied that certain work had been done in conformity with the law. The governor conceded that the work had been done in a proper manner, but insisted that the spirit of the statute had been violated, and for this reason refused to issue his certificate. The question involved was, so far as the relators were concerned, one of private right and private property, and they claimed that the question involved was purely judicial, involving nothing but a proper construction of the statute and the performance of a mere ministerial act; also, that when the act to be exercised is purely ministerial, the right of the citizen to have it exercised is absolute, and that the governor, no more than any other officer, is above the law, and the obligation of the courts, on a proper application, is to require him to obey the law. The court refused to draw any distinction between acts, on the part of the governor, which were discretionary, and acts merely ministerial, and refused to issue the writ. Mr. Justice Cooley, in delivering the opinion of the court, said: "There is no very clear and palpable line of distinction between those duties of the

governor which are political and those which are to be considered as ministerial merely; and if we should undertake to draw one, and to declare that in all cases falling on one side the line the governor was subject to judicial process, and in all falling on the other he was independent of it, we should open the doors to an endless train of litigation, and the cases would be numerous in which neither the governor nor the parties would be able to determine whether his conclusion was, under the law, to be final, and the courts would probably be appealed to by every dissatisfied party to subject a co-ordinate department of the government to their jurisdiction. However desirable a power in the judiciary to interfere in such cases might seem from the stand-point of interested parties, it is manifest that harmony of action between the executive and judicial departments would be directly threatened, and that the exercise of such power could only be justified on most imperative reasons. Moreover, it is not customary, in our republican government, to confer upon the governor duties merely ministerial, and in the performance of which he is to be left to no discretion whatever; and the presumption in all cases must be, where a duty is devolved upon the chief executive of the state rather than upon an inferior officer, that it is so because his superior judgment, discretion, and sense of responsibility were confided in for a more accurate, faithful, and discreet performance than could be relied upon if the duty were devolved upon an officer chosen for inferior duties. . . . We are not disposed, however, in the present case, to attempt, on any grounds, to distinguish it from other cases of executive duty, with a view to lay down a narrow rule which, while disposing of this motion, may leave the grave question it presents to be presented again and again in other cases which the ingenuity of counsel may be able to distinguish in some minor particulars from the one before us. If a broad general principle underlies all these cases, and requires the same decision in all, it would scarcely be respectful to the governor, or consistent with our own sense of duty, that we should seek to avoid its application, and strive to decide each in succession upon some narrow and perhaps technical point peculiar to each special case, if such might be discovered. And that there is such a broad general principle seems to us very plain": *People v. Governor*, 29 Mich. 320; 18 Am. Rep. 89.

In the late case of *State v. Board of Liquidation*, 42 La. Ann. 647-654, the court said: "It has long been a question of delicacy and great difficulty for the courts of this country, state and federal, of last resort, to determine where the exact line of demarcation is to be drawn between political and executive duties, for the performance of which *mandamus* will not go to the governor of a state, and purely ministerial duties, for the performance of which the writ will lie. When the official acts to be performed by the executive branch of the government are divided into ministerial and political, and courts assume the right to enforce the performance of the former, it opens a wide margin for the exercise of judicial power. The judge may say what acts are ministerial, and what political. Circumstances may arise, and conditions may exist, which would require the governor of a state, in the proper exercise of his duty, and with due regard to the interests of the state, not to perform a ministerial act. Is the judge to determine his duty in such a case, and compel him to perform it? The reasons of the executive for the non-performance of an act, the judge may never know; or if brought to his knowledge, he may review and overrule them, and in so doing assume political functions. He would determine in such case the policy of doing the act." The court then proceeded to answer its own question in the

negative, and refused to issue the writ to compel the performance, by the governor, of an act purely ministerial in its nature.

In the case of *Western R. R. Co. v. De Graff*, 27 Minn. 1-5, Mr. Justice Cornell, in delivering the opinion of the court, said: "Whether, under our constitution, any officer of the executive department of the state government can be subjected to judicial control and interference in the performance of an official duty, is a question which has been before this court in different forms and at different times for consideration and decision, and the holding has uniformly been against the existence of any such jurisdiction or power in the courts. It rests upon the constitutional principle that each of these departments of government is entirely independent of the others, so that neither can be made amenable to any other for its action or judgment in discharging the duties imposed upon it, whatever their source or nature. The principle applies to the performance of all official duties, whether imposed by the constitution, or by legislative enactment only, or whether they are of a character strictly ministerial, or such as call for the exercise of discretion and judgment alone. It follows that every act done, or attempted to be done, by any officer of the executive department, in his official and not in his individual capacity, is shielded from all judicial interference or control, either by *mandamus* or injunction, even though such act may be founded in an error of judgment, or an entire misapprehension of official duty under the law."

In *Hartranft's Appeal*, 85 Pa. St. 433, 27 Am. Rep. 667, it was decided that the governor of the state is the absolute judge of what official communications, to himself or his department, may or may not be revealed, and is the sole judge, not only of what his official duties are, but also of the time when they should be performed. He and his subordinates in the executive department are also exempt from the process of the courts, whenever engaged in their official capacity in any duty pertaining to their office.

In *Vicksburg etc. R. R. Co. v. Lowry*, 61 Miss. 102, 48 Am. Rep. 76, the court, by Chief Justice Campbell, said: "Can a *mandamus* be issued to the governor in any case? It has been held by some courts that the governor may be compelled, by *mandamus*, to perform ministerial acts; but the overwhelming weight of authority is in favor of the denial of the writ against the governor in any case. . . . The consideration that disobedience of the writ may be followed by imprisonment until compliance is decisive against the propriety of its issuance against the governor in any case. The chief executive power of the state is vested in him. It is his duty to see that the laws are faithfully executed. The power of the state is at his command for this purpose. He may, in cases of urgency, convene the legislature. He has important functions as part of the law-making power. It would be his duty to employ the power of the state at his command to maintain the rightful authority of the judiciary and enforce its judgments. May that judiciary imprison him for refusal to obey some order it may make to operate on him as the chief executive of the state? Whence comes this ascendancy of the judiciary over the executive? They are co-ordinate departments, created alike by the constitution, declared to be distinct, and to be kept separate as to the exercise of the powers confided to each. If the governor could not be removed from the performance of the functions of his office by imprisonment to compel compliance with the writ of *mandamus*, the judgment would be mere advice, and the courts do not advise. If it be assumed that the governor would not disobey the command of the writ, still it should be denied,

because he should not be subjected to the alternative of acting 'contrary to his judgment, or stand convicted of a disregard of the laws.'"

The latest case to announce the doctrine maintained by the cases cited above is that of *Hovey v. State*, 127 Ind. 588; 22 Am. St. Rep. 663; overruling *Gray v. State*, 72 Ind. 567, and earlier Indiana cases.

Illustrations. — In accordance with the views above expressed, it has been decided that *mandamus* will not issue to the governor of the state to compel him to issue a commission to a public officer regularly elected and alleged to be entitled to it: *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346; *State v. Dress*, 17 Fla. 67; *Low v. Towns*, 8 Ga. 360; *State v. Governor*, 39 Mo. 383; *Bates v. Taylor*, 87 Tenn. 319; *Hovey v. State*, 127 Ind. 588; 22 Am. St. Rep. 663; or to issue or deliver state bonds to persons alleging that they are entitled to receive them: *Jonesboro etc. Turnpike Co. v. Brown*, 8 Baxt. 490; 35 Am. Rep. 713; *People v. Bissell*, 19 Ill. 229; 68 Am. Dec. 591; or to canvass votes and declare the relator elected: *Dennett, Petitioner*, 32 Me. 508; 54 Am. Dec. 602; or to call an election: *People v. Cullom*, 100 Ill. 472; or to deposit a bill in the office of the secretary of state: *People v. Yates*, 40 Ill. 126; or to make requisition upon the state treasurer for the payment of funds: *Vicksburg etc. R. R. Co. v. Lowry*, 61 Miss. 102; 48 Am. Rep. 70; or to certify that public work admitted to have been properly done was performed according to contract created by statute: *People v. Governor*, 39 Mich. 320; 18 Am. Rep. 69; or to execute and deliver a deed to land to the party alleging himself entitled to it: *Rice v. Austin*, 19 Minn. 103; 18 Am. Rep. 330; or to subscribe, in the name of the state, to stock in a corporation, in pursuance of an act of the legislature: *State v. Warmoth*, 24 La. Ann. 361; 13 Am. Rep. 126; or to convene a court-martial: *Mauran v. Smith*, 5 R. I. 192; 5 Am. Rep. 564.

Authorities Authorizing Use of Writ. — On the other hand, there is a large and respectable number of cases which maintain that when a positive duty of a merely ministerial character is imposed upon the governor of the state; its performance may be enforced by the writ of *mandamus*, in the same manner as against any other public officer: *State v. Thayer*, 31 Neb. 82; *Martin v. Ingham*, 38 Kan. 641; *Middleton v. Low*, 30 Cal. 596; *Harpending v. Haight*, 39 Cal. 189; 2 Am. Rep. 432; *Tennessee etc. R. R. Co. v. Moore*, 36 Ala. 371; *Magruder v. Swann*, 25 Md. 173; *Groome v. Gwinn*, 43 Md. 572; *Chumaseiro v. Potts*, 2 Mont. 242; *State v. Blandcl*, 4 Nev. 241; *Cotten v. Ellis*, 7 Jones, 545; *State v. Chase*, 5 Ohio St. 528. While it must be admitted that these cases by no means constitute the majority of those bearing upon the subject, yet they seem to us to be based upon the better reasoning, and more in accord with what has been the long adopted policy of the highest judicial tribunal in the land, the supreme court of the United States: *Marbury v. Madison*, 1 Cranch, 137.

In a recent case, in which Secretary of State James G. Blaine was respondent, Mr. Chief Justice Fuller, in delivering the opinion of the court, said: "The writ of *mandamus* cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion. When, by special statute or otherwise, a mere ministerial duty is imposed upon the executive officers of the government, — that is, a service which they are bound to perform without further question, — then, if they refuse, the *mandamus* may be issued to compel them": *United States v. Blaine*, 139 U. S. 306-319; citing *United States v. Windom*, 137 U. S. 636; *United States v. Black*, 128 U. S. 40. "The writ goes to compel a party to do that which it is his duty to do with-

out it. It confers no new authority, and the party to be coerced must have the power to perform the act": *United States v. Blaine*, 139 U. S. 308-319; citing *Brownsville v. Loague*, 129 U. S. 493. In this connection it may be said that a ministerial act has been defined to be "an act performed in a prescribed manner, in obedience to the law, or the mandate of legal authority, without regard to or in the exercise of the judgment of the individual upon the propriety of the act being done": *Pennington v. Streight*, 54 Ind. 376. "A ministerial act is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed": *Martin v. Ingham*, 38 Kan. 641-651. In this case the court considered the cases upon this subject at great length, and in delivering the opinion said: "It is generally supposed that in a republican government all men are subject to the laws, and to the due administration of them, and that no man, nor any class of men, is exempt. There is no express provision in the constitution, nor in any statute, exempting any member of the executive department, chief or otherwise, from being sued in any of the courts of Kansas, or in any action coming within the jurisdiction of any particular court, civil or criminal, upon contract or upon tort, in *quo warranto*, *habeas corpus*, *mandamus*, or injunction, or from being liable to any process or writ properly issued by any court, as subpoenas, summonses, attachments, and other writs or process; and if any one of such officers is exempt from all kinds of suits in the courts, and from all kinds of process issued by the courts, it must be because of some hidden or occult implications of the constitution or the statutes, or from some inherent and insuperable barriers founded in the structure of the government itself, and not from the express provisions of the constitution or the statutes. So far as the present case is concerned, however, which is injunction, and another case, which is also before us, and which we are also considering, which is *mandamus*, it is only necessary for us to consider whether the governor, without reference to the other members of the executive department, is subject to the action of *mandamus* and injunction, or not. It might be proper here to state that so far as the express terms of the constitution and the statutes are concerned, the governor is no more exempt from *mandamus* or injunction than he is from any other action or proceeding in any of the courts, or than he is from any process, civil or criminal, issued by the courts. No other officer is above the law, and every other officer, to whatever department he may belong, may be compelled to perform a purely ministerial duty. It is said that if the governor opposes the order or judgment of the court, it cannot be enforced; for it is said that he has the entire control of the militia. But are the courts to anticipate that the governor may not perform his duties? Should not the courts rather presume that when a controversy is determined by the courts, the only tribunals authorized by the constitution or the statutes to construe the laws, and to determine controversies by way of judicial determination, the governor, as chief executive officer of the state, would see that such determination should be carried into full effect? Such would be his duty, and no one should suppose that he would fail to perform his duty, when his duty is made manifest by a judicial determination of the courts. No department should ever cease to perform its functions for fear that some other department may render its acts nugatory, or for fear that its acts may in some manner affect the conduct or *status* of some other department. Each department ought to do what is right within its own sphere, and presume that

the other departments will do the same. The legislature is not bound to refrain from passing laws affecting the executive department, whether the governor approves them or not. The legislature may pass laws over the governor's veto, and this for the government of the executive department; and the legislature is not bound to anticipate that the governor might refuse to enforce such laws. Each department should scrupulously perform the duties peculiarly intrusted to its own department, without reference to how the same might affect the other departments. Besides, if this argument from the governor's control of the militia were carried to its full extent, it would prevent any court from ever issuing any subpoena or any other writ or process to the governor, or from ever arresting him or ordering his arrest for any assault or battery, or for anything else, because the governor might, in any such case, refuse to obey the writ or the order of the court, and might call on the militia to assist him in his resistance. Perhaps we should say something further with respect to the claim that the three great branches of the government, the legislative, the judicial, and the executive, are co-equal and co-ordinate, and that one cannot control or direct the others. This may be true to some extent, and yet, as we have already seen, it is not true in many cases. For the purpose of passing laws, the legislature is supreme, and the other departments must obey; for the purpose of construing the laws and of determining controversies, the courts are supreme, and the other departments must obey; and for the purpose of ultimately enforcing the laws, the executive department is supreme, and the other departments must obey. But the executive department can enforce the statutory laws only as the legislature has enacted them; and where the courts have construed the laws in the determination of controversies, the executive department can enforce them only as thus construed, and is bound to see that the laws as thus construed, and the judgments and orders of the courts rendered or made in the determination of controversies, are respected and obeyed. And will not the executive department do it? Will it refuse in any instance? It will thus be seen that while each of the different departments of the government is superior to the others in some respects, yet that each is inferior to the others in other respects; and it is always difficult to compare things which are wholly unlike each other, or to call them equal. Each department, in its own sphere, is supreme, and each, outside its own sphere, is weak, and must obey. It will be readily admitted that the courts cannot control any executive act of the governor, or any executive power conferred upon him. But may they not control ministerial power wherever placed? Is not ministerial power always inferior to judicial power, and subject to judicial control? The recipient of ministerial power exercises no judgment, no discretion, but is simply bound to obey the law under a given state of facts; and to construe this law, and to ascertain these facts, are peculiarly within the province of the courts. If an applicant for relief, on the ground of the refusal to exercise or the wrongful exercise of ministerial power by the governor has no remedy in the courts, then he has no remedy at all. The remedy of impeachment, and the remedy of subsequent elections, suggested by some of the courts, may be a remedy to the public in general, but it cannot be a remedy to an individual sufferer for injuries or loss in person or to his property."

After a thorough and critical examination of the authorities *pro* and *con*, the court concludes by saying: "Upon the whole, however, if all the cases cited, except such as necessarily included the question whether the courts may in any case control the ministerial acts of the governor, be excluded,

and if only such cases as include the above question be considered, then not only reason, but the weight of authority we think, will be found in favor of the affirmative of the question. And certainly, as to all the executive officers except the governor, the great weight of authority, state and federal, is in favor of the theory that ministerial acts to be performed by an executive officer may be controlled by the judiciary. If we are correct in our conclusions, then we have jurisdiction to hear and determine the present case upon its merits. We have jurisdiction, whether the acts of the governor sought to be controlled in the present instance are ministerial acts, or acts of some other kind or character; and we have jurisdiction to determine whether the facts of the present case authorize the relief sought": *Martin v. Governor*, 38 Kan. 641-660.

It is to be noticed that in many of the cases maintaining the doctrine that *mandamus* will not issue against the governor of a state to compel him to perform a purely ministerial act, the judges rendering the decision have been unable to agree, and able dissenting opinions have been delivered. Thus in *State v. Governor*, 17 Fla. 67, maintaining that the governor will not be compelled by *mandamus* to issue a commission or certificate of election to the party duly elected, Mr. Justice Westcott dissented, and expressed his views at great length. In the course of his opinion he said: "The true doctrine upon this question, when we reason from general principles well established by abundant precedent in England and the United States, is, that where the act sought to be controlled is a ministerial act as contradistinguished from one involving a discretion, and upon its exercise depends a right of the citizen to enforce which there is no remedy, then the writ of *mandamus* lies. Having thus ascertained the principle of law applicable to executive ministerial duties and acts, I have, in my judgment, no more to do in this case than I would in any other case involving a question of title to land, or other ordinary action at law, and that is, to apply the principle to the case. I have simply to say that the governor is an executive officer; he has failed to perform a purely ministerial duty; the relator's right is thereby violated; he is entitled to this remedy; it is my duty to give it to him, and independent of and without reference to the extent of the physical power under the control of the respondent, or of such forces as he may induce to co-operate with him in resistance, — a thing which, in my judgment, has nothing to do with the question. I shall award the writ. As an answer to what I have written, it may be said that the act of the governor is here sought to be controlled, and in the cases from which I deduce my principle, it was the act of the head of an executive department, or bureau, of the federal government, and of the secretary of state, comptroller and attorney-general of a state. I admit the difference, and at the same time I do not hesitate to say that according to the plainest rules of construction, according to the clear letter of the constitution of this state, it is a difference without a distinction here. The difference is in nothing but in the degree of the office. One is a higher office than the other, but both are executive; the act to be done being in its nature essentially the same. If it be true, as a general principle, that executive officers may be controlled in ministerial acts, I inquire whether, under the constitution, this simple difference in degree renders the ministerial acts of one not the subject of judicial control, while the same act of the other is? There is no doubt that, under the constitutional distribution of power, there is nothing which elevates the governor over any other executive officer. The limit as to the power and function belonging to an executive officer is not because he is one officer or another, not because he is secretary of

state or governor, but because the power or function to be exercised belongs to the executive department of the government. In directing a ministerial act to be performed, we are discharging a judicial function; so, likewise, in a case involving individual right, we have an authority and power to determine the right of an individual; and if it depends upon the performance of a ministerial function by an executive officer, we may direct its performance by him. This is the law, to which all executive officers owe obedience, and under the constitution, the governor is not above and beyond the law. I do not see any ground for making this officer an exception. It is now, and has been since the time of Lord Mansfield, a function of the courts, when a matter of private right is involved, to control ministerial acts of executive officers. It is, in such a case, a judicial function to determine what is a ministerial act, and if the act be that of a governor, the constitution makes no difference as to it. But it is said we cannot enforce our writ. As to this I simply state a self-evident proposition. Whether a court has adequate physical power to enforce any process is not the method by which to determine its jurisdiction to issue it. The question of adequate power depends upon the amount and nature of the resisting power, and the degree of power which the court can bring to bear in the contest, neither of which matters determines the extent of the legal jurisdiction of any tribunal, whether it be one executive, legislative, or judicial in its character. An apprehension of such a collision, however, would be no excuse for the non-performance of what I conceive to be a plain duty, upon which depends the enforcement of the right of the citizen."

In *Hartman's Appeal*, 85 Pa. St. 433, 27 Am. Rep. 667-678, the dissenting opinion of Mr. Chief Justice Agnew is given in full. In concluding his remarks upon this subject, he said: "It is said the governor is the representative of the people, and therefore not responsible. This is true of executive duties, for therein the constitution, the adopted will of the people, is his warrant of authority; but it is untrue of judicial powers, for therein the judiciary represents the people, by the same warrant of authority; and if he violate the law, which it is the province of the judiciary to enforce by their authority, he is liable to the law. In a government of law instituted by a free people for their own benefit, there is no royal prerogative to do anything wrong; and therefore there can be no representation of their dignity, such as can strike down their law, and prevent its administration by its appropriate functionary. On no ground of the constitution, law, public justice, state policy, or sound reason can I discover any exemption of any officer in the state, high or low, from the common duty all citizens owe, to the due administration of justice. With these views I cannot consent to rob the judiciary of its constitutional powers, and exalt the executive above the demands of justice and the safety and welfare of the people."

"All this is but the result of the just and wholesome principle that no public functionary, whatever his official rank, is above the law, or will be permitted to violate its express command with impunity. While, therefore, it is true that in regard to many of the duties which belong to his office the governor has, from the very nature of the authority, a discretion which the courts cannot control, yet in reference to mere ministerial duties imposed upon him by the constitution or by statute, which might have been devolved on another officer if the legislature had seen fit, and on the performance of which some specific private right depends, he may be made amenable to the compulsory process of the proper court, by *mandamus*": *Tennessee etc. R. R. Co. v. Moore*, 36 Ala. 371-382.

Illustrations. — In accordance with these views, it has been decided that the governor of a state may be compelled, by *mandamus*, to perform any ministerial act, such as to accept a bond and draw an order, upon compliance with fixed conditions: *Tennessee etc. R. R. Co. v. Moore*, 36 Ala. 371; or to issue and sign a patent to land to one lawfully entitled thereto: *State v. Bladell*, 4 Nev. 241; *Middleton v. Low*, 30 Cal. 596; or to authenticate a statute, as required by law: *Harpending v. Haight*, 39 Cal. 189; 2 Am. Rep. 432; or to issue a commission of election to an officer duly elected: *Magruder v. Swann*, 25 Md. 173; *Groome v. Gwinn*, 43 Md. 572; or to canvass a vote, as required by statute: *Chumaseo v. Potts*, 2 Mont. 242; *State v. Thayer*, 31 Neb. 82; or to issue a warrant for salary to one having a right to demand it: *Cotton v. Ellis*, 7 Jones, 545; or to issue a proclamation that a corporation is entitled to do business: *State v. Chase*, 5 Ohio St. 528; or in any case when purely ministerial duties are, by statute, imposed upon the governor, and such duties are only such as might be devolved upon any other state officer or agent: *Martin v. Ingham*, 38 Kan. 641.

ALLEN v. GLYNN.

[17 COLORADO, 333.]

ELECTIONS — AUSTRALIAN BALLOT LAW — IRREGULARITY IN BALLOTS, WHEN WAIVED. — When, under election laws, public officers are intrusted with the preparation and form of ballots to be used, and ample provision is made for the correction of errors therein, either by a candidate or other elector before the election is held, any objection to irregularities in the form of the ballot, or to the presence thereon of a name not entitled to be there, must be regarded as waived by a candidate, after the election has been held and such ballots have been voted.

ELECTIONS — ERRORS OF PUBLIC OFFICERS WILL NOT INVALIDATE. — While election laws are mandatory in the sense that they impose a duty upon those who come within their terms, yet, when public officers are intrusted with the preparation of the ballots voted, the election will not be invalidated because of every departure on the part of such officers from the terms of such laws.

ELECTIONS — METHOD OF VOTING UNDER "AUSTRALIAN" SYSTEM. — Under the "Australian ballot system," an elector desiring to vote an entire ticket need only put a cross at the head of the ballot; but if there is a single candidate on the ticket whom he does not wish to vote for, he must omit the cross at the top, and place it opposite the name of every candidate voted for, in order that his ballot may not be counted for the candidate falling under his displeasure.

ELECTIONS — AUSTRALIAN BALLOT LAW — BALLOTS WITH CROSS AT HEAD, HOW COUNTED — ERRONEOUS PLACING OF CANDIDATE. — When, under the Australian system of voting, the name of an opposing candidate is erroneously placed upon a ballot prepared by public officers, all such ballots cast with a cross at the head thereof will be counted for such candidate, and it will not be presumed that the elector casting such ballot does not wish nor intend to vote for any candidate for that particular office.

ELECTIONS — ERRORS OF PUBLIC OFFICERS IN PRINTING BALLOTS WILL NOT

INVALIDATE. — When the election laws provide severe penalties against public officers for violations thereof, a failure of such officers to publish the names of candidates as required, or error in printing their names under the wrong party title, will not necessarily invalidate the ballots so printed and voted at an election.

ELECTION CONTEST — RIGHT TO HOLD OVER. — On the trial of an election contest, pure and simple, the right of the contestor to hold over under an appointment to the office in dispute will not be considered.

CONTEST of election of district judge in the thirteenth judicial district of Colorado. The following provisions of the statute (Col. Sess. Laws 1891, pp. 143 et seq.) are necessary to a correct understanding of the opinion: "Sec. 1. All ballots cast in elections for public officers, or for the decision of any question submitted to electors, within this state, shall be printed and distributed at public expense. The printing of ballots and cards of instruction for the voters in each county, and the delivery of the same to the election officers as hereinafter provided, shall be a county charge, the payment of which shall be provided for in the same manner as the payment of other county expenses, but the expense of printing and delivering ballots and cards of instruction to be used in municipal elections shall be a charge upon the city or town in which such elections shall be held." "Sec. 13. All certificates of nomination which are in apparent conformity with the provisions of this act shall be deemed to be valid, unless objection thereto shall be duly made in writing within three days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby, addressed to them at their respective post-office addresses, if any, or place of residence, as given in the certificate of nomination. The officer with whom the original certificate was filed shall pass upon the validity of such objection, and his decision shall be final; provided, such officer shall decide such objection within at least forty-eight hours after the same is filed, and any objection sustained may be remedied or defect cured upon the original certificate, or by an amendment thereto, or by filing a new certificate within three days after such objection is sustained." "Sec. 18. . . . Upon each ballot, commencing not less than two inches below the bottom line of the duplicate stub, shall be printed the caption and device, if any, with the name thereunder, of each office to be filled at the then ensuing election, and the name or names of such candidates therefor, respectively, as may have been certified therefor in the certificates hereinabove mentioned.

Each set of nominations shall be arranged in a list running lengthwise of the ballot, with the appropriate designation of the political party, committee, or persons making such nominations, as set forth in the certificate thereof; and it shall be lawful to designate each or any set of nominations in the certificate thereof, and upon the ballots, by an appropriate emblem or design, such as a flag, eagle, rooster, or other device, as may be set forth in the certificate of nomination; provided, no two sets of nominations shall have the same device therein, and each political party shall have the prior right to use the device used by it at the last previous general election. Each set of nominations shall be arranged on such ballot, side by side, lengthwise, with the name of each office in each set of nominations in a parallel line, and just above the name of the candidate for such office, and when there is no nominee in any particular set of nominations, a blank shall be left under said office." "Sec. 20. Whenever it shall appear, by affidavit of a candidate or his agent, that an error or omission has occurred in the publication of the names or description of the candidates nominated for office or in the printing of the sample or official ballots, the district or county court, or a judge thereof, either in term time or in vacation, may, upon petition of such candidate or his agent, by order, require the county clerk, city clerk, or town clerk charged with the duty in respect to which an error or omission has occurred to forthwith correct such error, or to forthwith show cause why such error should not be corrected, costs, including a reasonable attorney's fee, may be taxed, in the discretion of such court or judge, against either party. The county clerk, city clerk, or town clerk shall also, on their own motion, correct, without delay, any error in all ballots which he or they may discover, or which shall be brought to his or their attention, and which can be corrected without interfering with the timely distribution of the ballots as herein provided." "Sec. 26. On receiving his ballot, the voter shall forthwith, and without leaving the inclosed space, retire alone to one of the voting-shelves or compartments so provided, and shall prepare his ballot, by marking, in ink, in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled; and in case of a question submitted to a vote of the people, by marking in the appropriate margin or place a cross (X) against the answer which he desires to give; provided, that where a voter desires to vote for all the

nominations included in one set of nominations, instead of marking a cross opposite the name of each candidate, he may mark a cross (X) above such list of nominations, and near to the device, emblem, or design designating such list of nominations, if such device, emblem, or design there be, and such mark shall indicate that the voter cast his ballot for all the nominations in the list under such device." "Sec. 36. Every public officer upon whom any duty is imposed by this act who violates his said duty, or who neglects or omits to perform the same, shall be punished, except as otherwise in this act specially provided, by imprisonment in the county jail for a term not exceeding one year, or by a fine of not less than one hundred dollars, and not more than three thousand dollars, or by both such fine and imprisonment."

H. B. Johnson, H. N. Hayes, and C. L. Allen, for the contestor.

Riddell, Starkweather, and Dixon, for the contestee.

HAYT, C. J. This is the first contest instituted in this court under the new election law, "the Australian ballot system." Questions affecting the freedom and purity of elections are of vital importance under our system of government. While the present contest is important to the contestants and the people of the thirteenth judicial district, it is of still greater importance on account of its effect upon the cause of ballot reform.

It is to be noted, at the outset, that, in common parlance, "the Australian ballot system" is a name applied indiscriminately, in enactments of different states widely dissimilar in many important particulars, so that with us the name is of little significance. It is doubtful if any state has yet, or will in the future, adopt without change "the Australian ballot law" as it is found in the island of its birth. Some of its essential features have been discarded, no doubt as inapplicable to our institutions and theory of government. The act under which this contest must be determined contains forty-four sections. It will only be necessary, however, to refer to a few of these sections in this opinion. By the first section provision is made for printing and distributing all ballots by public officers at public expense. Section 2 excepts certain school and special elections from the requirements of the first section. Sections 8 to 12, inclusive, provide in detail the manner of making, certifying, and publishing nominations. Section 13 provides the

mode in which objections to certificates of nominations may be made and determined, and also provides how defects in such certificates may be cured. Section 14 relates to acceptances of nominations, while by the next section provision is made for filling vacancies in nominations.

Turning to the complaint, we find that paragraphs 12 to 15, inclusive, against which (and paragraphs 16 to 17) this motion to strike is interposed, relate exclusively to the manner in which certain candidates were nominated and their names published, and the way in which Glynn's name was placed upon certain tickets. Paragraphs 16 to 17 have reference to the number of legal votes received and registered. If the allegations contained in these latter paragraphs are to be taken as true, then it appears that contestant received a majority of all the legal votes cast. It is probable these paragraphs were included in the motion to strike out by mistake. The allegations appear to be legal and proper; and so far as the motion applies to them, it will be overruled without further comment. That part of the motion which is directed to paragraphs 12 to 15, inclusive, raises the principal question upon which we are called to pass at this time. It is alleged, in substance, in these paragraphs, that contestee, Glynn, was originally nominated by one hundred independent voters of the district. These independents selected as the name by which they were to be designated "People's Party," and adopted the device or design, "Emblem of Justice." That one Quitman Brown was nominated as a candidate for district attorney by the same persons and at the same time. The certificate of these nominations was duly filed in the office of the secretary of state. Some time after this had been done, five hundred or more independent voters, residing principally in Arapahoe County, and none of them in the thirteenth judicial district, placed in nomination a candidate for justice of the supreme court, and selected as their name "The People's Party for Colorado," and as their emblem or device, "Cottage Home." A certificate of this nomination was duly filed in the office of the secretary of state.

Neither the contestee, nor his associate, Brown, accepted the first nomination, as required by law. To remedy this omission, certain persons, chosen by the original convention to fill vacancies, selected contestee and said Brown for the offices of district judge and district attorney, respectively, and the candidates having accepted, their names were certified by

the secretary of state to the several county clerks as thus duly nominated. In four of the five counties of the district there was no printed notice given by any newspaper or publication advising the electors of the nomination of either contestee or his associate. In the fifth county, this being the county of Washington, their nominations were published under the device, "Emblem of Justice," as a separate set of nominations. In this county official ballots were printed containing four columns or sets of nominations, viz.: 1. The Republican list, under the device, "Eagle," containing the name of contestor; 2. The Democratic list, under the device, "Rooster," containing the name of William T. Skelton; 3. A list designated as "People's Party," under the device, "Cottage Home," containing the name of a candidate for supreme judge only; 4. A list, also designated "People's Party," under the device, "Emblem of Justice," containing the name of contestee and others. In the remaining counties of the district the official ballots were printed with three parallel columns; the first and second containing the Republican and Democratic list, respectively, and the third, designated "People's Party," under the device, "Cottage Home," containing the name of John H. Croxton for supreme judge, contestee for district judge, Quitman Brown for district attorney, and other candidates.

It is claimed that about 150 ballots in said four counties, of which 100 were in the county of Yuma, were erroneously counted, certified, and returned as votes cast for contestee for the office of judge of the thirteenth judicial district; that said ballots were marked by said electors at said election only by a cross, in ink, under the device, "Cottage Home"; that there was no other mark to indicate that said voters desired to vote for contestee; that all the other ballots which were counted, certified, and returned for contestee were marked by a cross against his name, as printed under the device, "Cottage Home," and not under the emblem or device, "The Emblem of Justice," as was the case with the county of Washington. It is further alleged that the state board of canvassers certified as the result of the returns submitted to them that contestee received a plurality of two votes.

The position of contestor with reference to the 150 ballots with the device, "Cottage Home," is, that said ballots should not have been counted for contestee, since, under the law, it is claimed that there was no possible way of voting for him except by placing a cross near the device, "Emblem of Justice,"

or by a cross to the right of his name. If this position can be maintained, it follows that contestor is shown to have been elected, regardless of those allegations of the complaint which relate to certain other alleged irregularities.

In support of the position taken by contestor, our attention is directed to the provisions of section 18 of the act; the arguments based upon this section being, that the nominations of Glynn and Brown constituted a single set of nominations; that the persons who filed the certificate selected a name and also a device, and nominated a candidate for district judge, and a candidate for district attorney, and no other candidates; while those who placed in nomination John H. Croxton selected a different device and a different name, both said device and name being quite dissimilar from that selected by the Glynn and Brown convention.

It is said that there is absolutely nothing in the statute which justified the placing of the name of Glynn or Brown in the list or set of nominations with the name of John H. Croxton under the device, "Cottage Home." The argument further proceeds to assume that for the purpose of preventing the putting in one list of nominations for different offices made at different times and by different persons not connected by party ties, the statute expressly provided, when there is no nominee of any party, or set of nominations, a blank shall be left under said office. It is said, therefore, that under the device, "Cottage Home," and under the name of John H. Croxton as candidate for supreme judge, a blank should have been left for district judge and for district attorney, no nominations having been made for either of said offices by the persons who nominated John H. Croxton, or by any persons who selected the device, "Cottage Home."

If the contention of counsel be correct, and if it be admitted that these names were improperly printed upon certain ballots, does it follow that such ballots, after having been voted, should not be counted for the person for whom they were cast?

An examination of the statute shows that provisions for the correction of certain defects and irregularities are therein made. By section 13 of the act it is provided that certificates shall be deemed valid, unless written objection be filed within a time fixed, and that when such objections are filed the candidates shall be notified of the same. It further provides that the officer with whom the certificate is filed shall pass upon the validity of the objection made, and that his decision

shall be final; and in case any objection shall be sustained, the certificates may be amended or a new certificate filed.

In considering this phase of the present controversy, we have to do more particularly with another section, and refer to section 13 merely for the purpose of showing the liberal tenor of the act, so far as the voter is concerned. In section 20 it is provided that whenever it shall appear by affidavit of a candidate or his agent that an error or omission has occurred in the publication of the names or description of candidates nominated for office, or in the printing of the sample or official ballots, the district or county court may correct such error. By this section it is further provided that the county clerk, city clerk, or town clerk, as the case may be, may, on his own motion, correct, without delay, any error in all ballots which he or they may discover, or which shall be brought to his notice, and which can be corrected without interfering with the timely distribution of the ballots. By other sections it is provided that the name of every candidate whose name has been properly certified shall be on one and the same ballot; that sample ballots shall be in the county clerk's possession seven days before election, subject to public inspection, and official ballots four days before election. It is also provided for posting of sample ballots, etc.

An examination of these sections will show that the legislature has made ample provision for the correction of ballots prior to the election; and it would seem to be the duty of candidates to make such objections in seasonable time. It is believed that it would not be in the interests of a fair expression of the will of the people to allow a candidate to lie by and not point out such objections as he may have to the form of the ballot until after the election has been held. If this be true, contestor should have spoken before the election. The fundamental object of all election laws is the freedom and purity of the ballot. It is to be observed that the voter has no control whatever over the publication of the names of candidates or the form of the ballots. If, for some defect in these particulars, the ballot must be rejected, the door would be open to fraud. To defeat the will of the people, it would only be necessary to have the county clerk furnish the electors, or some of them, with tickets slightly variant from those prescribed by law. It would seem to be the purpose of this section to give the opposing candidate ample opportunity to see that his opponent's name was not upon an unauthorized

ticket, or under a device to the use of which he was not entitled. We do not think that those decisions which have been cited, holding that all provisions of the statutes are mandatory, and that ballots should be rejected that are not in all particulars in conformity to the requirements of the act, are entitled to much weight, in view of the provisions of this act. In order to make such decisions controlling, it should appear that the provision for objection and amendment was equally as liberal in those states as under our statute. It may be said that all provisions of such laws are mandatory in the sense that they place a duty upon those who come within their terms. But it does not follow that an election should be invalidated because of every departure on the part of public officers from the terms of the act: *Bowers v. Smith*, Mo., Nov., 1891; 17 S. W. Rep. 761. We do not feel at liberty to place a narrow construction upon this act. To overthrow the expressed will of a large number of voters for no fault of theirs, as we are asked to do, would be to defeat the purpose of all election laws, which is to obtain a full and fair expression of the wishes of the voters: *Kellogg v. Hickman*, 12 Col. 256.

Something is predicated upon the fact that certain voters put a cross opposite the name of Glynn upon the tickets claimed to be irregular. This was necessary, under the statute, whenever a voter did not wish to vote for all the names in a particular set of "nominations."

If he desired to vote the entire ticket, it was only necessary for him to put a cross near the emblem, but if there was the name of a single candidate he did not wish to vote for included in the list, he was practically compelled to check the name of every candidate voted for, in order that his ballot might not be counted for the candidate falling under his displeasure. It affirmatively appears from this petition that all tickets voted had printed thereon in parallel columns the names of Glynn, Allen, and Skelton. Now, if the voters, by putting a cross near the emblem upon the People's ticket, did not thereby intend to vote for all the candidates whose names were beneath, including Glynn's, we would certainly have found a cross opposite the name of the opposing candidates, Allen or Skelton, according as the choice of the voter may have fallen upon the one or the other of these. It is certainly unreasonable to suppose, as the argument assumes, that

voters to the number of 150 did not wish to vote for any candidate for this important office.

There is no basis for any claim of fraudulent intent on the part of the county clerks, or either of them; on the contrary, it appears that Glynn was put in nomination by an independent party, and that he ran against the nominees of both of the old parties, to which parties the clerks owed allegiance. For failure to publish the names of candidates as required, and for violations of the statute with reference to the printing of tickets, severe penalties are prescribed by the act. Under these circumstances we do not believe that the court would be justified in rejecting these 150 ballots because of the failure of the county clerks to make the proper publication, or for the reason that they improperly printed the name of contestee under the device, "Cottage Home." The case of *Bowers v. Smith*, Mo., Nov., 1891, is strictly in point. In that case the Union Labor party, not having polled the requisite vote in the next preceding election, was not entitled, as a party, to put a ticket in the field. A ticket having been nominated, however, duly certified, and ballots printed and furnished to voters with such nominations, the court held that objection, because of insufficiency of votes at the previous election, must be made before such ballots were polled, and not afterward.

There is but one other matter reached by this motion. It is alleged in the complaint that the contestor was duly appointed to the office of district judge by the governor, and that he was the qualified and acting district judge at the time contestee assumed to discharge the duties of said office. This being an election contest, pure and simple, and not a proceeding in the nature of *quo warranto* under the code, no question as to contestor Allen's right to hold over under the original appointment can be considered. And for the reasons already given, paragraphs 12 to 15, inclusive, will be stricken out. Paragraphs 16 to 17 being properly in the complaint, the motion as to these paragraphs will be overruled.

UPON PETITION FOR A REHEARING.

Per CURIAM. The petition for a rehearing in this case is supported by an able and exhaustive argument, which we have carefully considered.

As a result of our examination, we are convinced of the correctness of the views announced in the original opinion, and of the result then reached.

Counsel insist that "150 ballots" should not be counted for Glynn, because of the errors of the public officers charged with the duty of providing the ballots. These errors, without doubt, arose from the fact that the People's Party in the thirteenth judicial district selected a different emblem from the one chosen by the state convention of the "People's Party for Colorado," and the county clerks, through inadvertence, caused the official tickets to be printed without reference to such different emblems.

Is it possible that by any refinement of reasoning this position of counsel can be shown to be right,—that the ballots of 150 legal voters can be rejected for what, at most, are but irregularities on the part of public officials, and the expressed will of the voters of the district be thereby thwarted?

In speaking of this action of the clerks as an irregularity merely, we do so advisedly; for, aside from the distinction attempted to be drawn between the name "The People's Party" and "The People's Party for Colorado," the only reason assigned for the rejection of these ballots is, that the name of Glynn was printed and voted under a device to the use of which he was not entitled. As to the first objection, it is apparent that both conventions were conventions of the People's party, and the addition of the words "for Colorado," in the one instance, is quite immaterial. And as to the difference in the emblems or devices chosen, it is not clear that Glynn was not as much entitled to have his name printed under the one chosen by the state convention, and adopted by the majority of the county clerks, as under the one selected by the convention held in the thirteenth judicial district. Counsel say that since the year 1883 ballots with a designated heading containing names not belonging thereon have been denounced as fraudulent, and the counting of such names prohibited by statute; and our attention is called to the following provision:—

"When a ballot with a certain designated heading contains printed thereon in place of another name not found on the regular ballot having such heading, such name shall be regarded by the judges as having been placed thereon for the purpose of fraud, and such ballot shall not be counted for the name so found": Sess. Laws 1883, p. 187.

It is conceded that this statute was repealed at the last session of the legislature, and prior to the time of holding the election under consideration. The repeal furnishes a strong

argument against the deduction of counsel, unless it can be shown that some provision similar in effect has been enacted in lieu thereof.

The provision of the new statute relied upon as accomplishing the same result as the former statute is found in section 18, and reads as follows: "When there is no nominee in any particular set of nominations, a blank shall be left under said office." This, in our judgment, falls far short of the declaration contained in the repealed statute. It would have been a very simple matter for the legislature to have provided that ballots like those used in this instance should not be counted, or that names found in lists where they do not belong should be rejected. This has not been done. Moreover, it has been held that when the wording of a statute has been radically changed, the change of language indicates a change of intent on the part of the legislature: *Heinssen v. State*, 14 Col. 228.

Again, the reason for the repeal of the provision of the former statute is obvious. At the time of its enactment the printing of tickets was not under the direction of the public officers. Any person might procure tickets to be printed containing such names, and such names only, as he chose to have placed thereon. Frequently "mixed tickets" were procured and secretly kept until the day of the election, and then substituted for the regular tickets, and the voters, no doubt, often deceived thereby. Under the new law, as we have seen, the printing of all tickets is under the direction of public officers.

Moreover, by section 17 of the present act, sample ballots are required to be printed and in the possession of the officers charged with the duty of preparing such ballots seven days before the election, subject to public inspection. Ample provision is also made for the posting of such ballots in each precinct. Under these circumstances the chances for deceiving the voter are reduced to the minimum.

In order to show that in our former opinion we made no unwarrantable deduction from the opinion of the supreme court of Missouri in the case of *Bowers v. Smith*, Mo., Nov., 1891, it is only necessary for us to quote the following passage from the Missouri court: "It must have been already noted that the questioned act of the county clerk consisted of admitting names to the official ballot, not of excluding any. There is a substantial difference in principle between admitting and excluding such names. Under the latest English act before us, the ruling of such officers admitting nominees

to the official ballot are declared to be final, but rulings denying such right, when claimed, are subject to review by competent outside authority. The error of the officer, if any there be, is vastly different, in its practical consequences, when he thereby admits another name on the ticket, from his error in rejecting a nominee. In our statute it is provided that 'when-ever it shall appear by affidavit that an error or omission has occurred in the publication of the names or description of candidates nominated for office, or in the printing of the ballots, the circuit court of any county, or the judge thereof in vacation, or if the circuit judge is then absent from the county a judge of the county court, may, upon application by any elector, by order, require the clerk of the county court to correct such error, or to show cause why such error should not be corrected': Rev. Stats. 1889, sec. 4778. In accordance with the spirit of the law prevailing in this country respecting popular elections, we think it should be held that where a candidate for public office causes no timely objection to be made, as required by the section quoted, he must be regarded as having waived any objection that may exist to the presence on the official ballots of names not properly entitled to be there."

As to the argument that these views would entail upon each candidate the necessity of visiting each precinct in his territory for the purpose of making an examination of the official ballots, we answer, that until there is a decided change, the zeal of those holding antagonistic political opinions may be safely relied upon to expose any error in the printing of tickets, whereby voters would be liable to be misled. It must be presumed that public officers charged with the conduct of elections will act honestly; and while it may not be possible to provide absolutely against fraud, we believe that experience will show that the views heretofore announced will advance the cause of ballot reform in this state.

The petition for a rehearing will be denied.

MR. JUSTICE HALE dissented from the conclusion reached by a majority of the court, and in so doing laid particular stress upon that portion of the election law under discussion which provides that all lists of nominations regularly made and certified, whether by convention or petition, shall be printed in separate columns upon a single ballot, and that when no candidate is selected for a given office a blank shall be left upon the ballot under the name of the office. The statute guarantees to every voter that every name upon a particular list printed upon the ballot represents a candidate regu-

larly chosen by the party whose name and emblem heads the list. "If Democratic in principle, he has a right to rely upon the fact that the names of candidates found on the ticket under the title 'Democratic Party,' and under the emblem adopted by that party, are the regular nominees of the party. Every line of the statute bearing upon the subject sanctions this view. But if, despite such a disregard of the law as is alleged in this case, the vote can be effective, the statute upon which the voter relies is grossly misleading, and becomes potent in accomplishing a dangerous and wicked deception, . . . as it constitutes a fraud in law which tends to, and in all probability did, deceive voters."

"The case should be considered precisely as if the illegality had resulted from placing the name of a Republican nominee in the list of Democratic candidates and under the Democratic emblem, or by inserting the name of a 'Prohibition' nominee by petition in a list of People's party candidates also named by petition and under the People's party emblem. And the principle involved would be in no wise different if the name thus illegally placed in the wrong list were substituted for that of a regular nominee, instead of filling a space which the statute imperatively commands to be left vacant.

"Such illegal acts, whether intentional or unintentional, as are here detailed will, if tolerated, open wide the very door to fraud the legislature sought to close. Not only is the candidate who might otherwise be chosen cheated out of his election, but above and beyond this circumstance, and of vastly greater public importance, is the consideration that by this means this honest voter himself is also grossly defrauded. I do not forget that the opinion of the court assumes that the conclusion there reached tends to promote the interests of the voter. The reason given for the assumption is, that under a different view 'to defeat the will of the people, it would be only necessary to have the county clerk furnish the electors, or some of them, with tickets slightly variant from those prescribed by law.' With all due respect to the learning of my worthy and able associates, I ask, what is 'the will of the people'? and how is that will disclosed? I contend that when the voter, either by fraud or negligence, is led to vote for a candidate he does not intend to favor, his will is not declared; on the contrary, that his vote is made to express a choice directly in conflict with his will. Neither does it follow that if my position in this regard be maintained, all tickets 'slightly variant from those prescribed by law' would be thrown out. There are, doubtless, minor directions in the statute which are not so mandatory as that a non-compliance therewith will, in contests after the vote has, without objections, been cast and counted, require that such vote be disregarded. But it is clear that the subject with which we are now dealing does not constitute one of these minor features. . . . In this connection I desire to emphasize the fact that the entire ballot would not be rejected. When the voter has declared his intent by placing a mark near the emblem, his vote counts for all the names properly on the list beneath that emblem. Each and every candidate for whom he intended to vote receives the full benefit of his ballot. His action is only disregarded as to the name illegally printed in the list, the name of the candidate for whom the legal presumption obtains, in view of the statute, that he did not intend to vote. No vote intentionally given is thrown out. The court simply refuses to count a vote the elector did not intend to cast."

"The opinion filed does not deny the fact that contestee's name was ille-

gally printed in a list of names, and under an emblem where it did not belong. But it is claimed that because contestor did not have the official ballot in the four counties where the illegality existed corrected before the election, he should not now be heard to complain; that is to say, the opinion, in effect, holds that the duty is imposed upon each and every candidate for office, not only to see that his own name is correctly printed in the proper list, but also to see that his opponent's name is not fraudulently, ignorantly, or negligently placed in the wrong column. A candidate for office on the state ticket must, at his peril, see that in every one of the fifty-five counties of the state no illegality of this kind in favor of his opponent exists.

"Waiving for a moment the important consideration of fraud upon voters, I observe that such a burden should not be imposed upon the candidates, unless it be sanctioned by plain statutory authority. For this authority reference is made to sections 17 and 20 of the election statute. Section 17, among other things, provides for the preparation of sample official ballots by the county clerk in each county, which are kept subject to inspection during seven days preceding the election. By section 20, provision is made that a candidate, or his agent, may have any 'error or omission' in the official ballot corrected; it is also made the duty of the county clerk, on his own motion, to rectify any imperfections he may himself discover, or that may otherwise be brought to his attention. Upon these provisions alone is reliance placed for the declaration, in effect, that because contestor did not discover and complain of the illegality before the election, he has waived the right to be now heard.

"Undoubtedly, a candidate who discovers, by means of the sample ballot thus exhibited, that his opponent's name is, through mistake or fraud, printed in a list where it should not be, may object, and have a proper correction made. But I find no intimation that if he fails to discover the 'error or omission,' whereby such a wrong upon himself and the voter is perpetrated, he shall be held to have waived the objection. If the legislature had intended the latter result to follow, such intent would have been plainly expressed. This observation is founded upon a well-known rule of construction, and its present applicability is vindicated by the language employed in a preceding provision of the same act. Section 13 declares that 'all certificates of nomination which are in apparent conformity with the provisions of this act shall be deemed to be valid, unless objection thereto shall be duly made in writing within three days after the filing of the same.' It then provides the procedure for investigating such objections, and also for curing defects. It thus appears that the precaution was taken by the framers of the law to state a waiver should follow the omission to interpose timely written objections to certificates of nominations; and this precaution relates to a matter obviously of far less importance than the careful, accurate, and honest preparation of official ballots.

"The preparation of official ballots by public officers is an important feature of the new act. It is strictly in line with the legislative endeavor otherwise shown by the act to prevent fraud and deception upon the voter. The trouble and expense thus incurred will be vastly more than compensated by the result, provided the law in this regard be intelligently and honestly executed. But when the statutory directions are disobeyed, when, either dishonestly or negligently, illegal ballots are prepared, and when such disobedience and illegality result in deceiving the voter, the beneficent legislative design is nullified. I cannot believe that the will of the legislature can be thus defied, and the interests of the voter be thus sacrificed, with im-

punity. To say that because the government has undertaken to prepare a ballot for the voter's use, though, through disobedience of law, this ballot becomes an instrument of fraud, he shall have no redress, and the candidate fraudulently benefited shall reap the fruits of the fraud, would, in my judgment, be a most impotent and indefensible position and conclusion. The opinion of the court mentions provisions relating to the punishment of officers charged with misconduct in the preparation of ballots and the conducting of elections. Such provisions there are, and the statute would indeed be weak without them. But they are not sufficient. They are not intended or expected to redress wrong like the one now charged; their office is to prevent a perpetration of the wrong, and to prevent its repetition if perpetrated. The punishment of an officer who ignorantly or dishonestly connives at the preparation of a fraudulent ballot, while the party in whose interest the fraud is perpetrated reaps the benefit thereof, falls short of satisfying the requirements of justice or law. Such punishment is inadequate satisfaction to the man who would have been lawfully elected but for the fraud; and it is even poorer satisfaction to the voter who has been fraudulently induced to cast a ballot contrary to his intention. I do not think these provisions, always difficult as they are to enforce, will have the effect of averting the injustice and wrong above referred to, and of preventing the opinion filed from practically destroying the usefulness of one of the most important and beneficial features of the statute." It will be observed that the decision in the principal case is, impliedly at least, in conflict with *Eaton v. Brown*, 96 Cal. 371, ante, p. 225, in this, that it proceeds upon the assumption that the legislature may provide for heading ballots with the names of political parties, and may authorize a voter to vote for all the candidates of a party by putting a single cross opposite the name of such party, while the courts of California do not permit ballots to be headed with the name of any political party, holding that the nominees of such parties must submit to be voted for in the same manner as other candidates.

ELECTIONS — BALLOTS — IRREGULARITY — WAIVER. — If tinted paper be selected by the secretary of state and furnished for ballot paper, ballots printed upon it are lawful, and must be counted: *State v. Wolf*, 17 Or. 119; *People v. Kilduff*, 15 Ill. 492; 60 Am. Dec. 769, and note. Where the county court has ordered a stock law submitted to the electors at a general election, their votes for or against it, written upon the ballots, do not render such ballots fraudulent: *Gamm v. Hubbard*, 97 Mo. 311; 10 Am. St. Rep. 312. See also *Kreitz v. Behrensmeier*, 125 Ill. 141; 8 Am. St. Rep. 349, and note.

ELECTIONS — EFFECT OF ERRORS OF ELECTION OFFICERS. — Irregularities of election officers, or their failure to observe some directory provision of the law, does not vitiate the election: *Parris v. Winberg*, 130 Ind. 561; 30 Am. St. Rep. 254, and note.

ELECTIONS — METHOD OF VOTING UNDER AUSTRALIAN BALLOT LAW. — An elector voting under the Australian system must indicate his choice by stamping one of the squares of his ballot; he must not stamp it elsewhere: *Parris v. Winberg*, 130 Ind. 561; 30 Am. St. Rep. 254.

SAINT v. GUERRERIO.

[17 COLORADO, 448.]

PLEADINGS, AMENDMENTS OF. — Power to allow amendments to pleadings is, in a large degree, in the discretion of the court, and should be liberally exercised, in the furtherance of justice; but when an application to amend is resisted, it should not be granted, except upon good cause shown, and upon such terms as the justice of the particular case may require.

WATERS — RIGHTS OF PRIOR APPROPRIATOR AGAINST DIVERSION. — A party entitled to the prior right to use the water of a stream cannot identify certain specific water as his while running in the stream, unless he can show that he is entitled to all of such water. So long as he is able to secure the full amount of water to which he is entitled, he cannot complain that some other person, higher up the stream, is diverting its waters.

WATERS — RIGHTS OF PRIOR APPROPRIATOR AGAINST DIVERSION — JOINDER OF PARTIES. — A party who is entitled, by right of prior appropriation, to the use of the water from a natural stream is entitled to have such priority protected against the acts of junior appropriators to his injury, whether such acts are joint or several, and for that purpose he is entitled, if necessary, to join them all as defendants in one action.

WATERS — APPROPRIATION — RIGHT OF WAY. — In an action involving a contest between water appropriators as to priority of right to the use of water, the court may determine who is entitled to a right of way for the carriage of water through a ditch already constructed, although the action is not brought to condemn a right of way under the act of eminent domain.

JURY IN EQUITY CASES — INSTRUCTIONS. — In cases of equitable cognizance, triable with or without a jury, the court may call a jury to try such specific questions of fact as may be presented to it, reserving to itself the power to make its own findings upon consideration of the evidence and the verdict of the jury, and in such cases the court may refuse to give the jury any instructions.

TRIAL — SEPARATE TRIAL FOR SEVERAL DEFENDANTS properly joined in a civil action cannot be claimed as matter of right, and may be refused, in the discretion of the court.

JURY — RIGHT TO VIEW PREMISES. — It is within the discretion of the trial court to grant or refuse a request to have the jury view the premises or property in litigation in a civil action of equitable cognizance.

JURY IN EQUITY CASES — SUBMITTING QUESTIONS TO. — The right to have certain questions of fact passed upon by the jury in a civil action of equitable cognizance is a matter in the sound discretion of the court. The privilege cannot be insisted upon *ad libitum*, and the number and character of the questions should be controlled within reasonable limits.

M. J. Bartley and W. C. Kingsley, for the appellants.

Joseph W. Taylor and E. T. Taylor, for the appellee.

ELLIOTT, J. Error is assigned to the action of the court in overruling the several objections to the first and second amended complaints.

1. The process, pleadings, and interlocutory orders in this cause are exceedingly voluminous, extending through more than three hundred folios of the transcript. The record is greatly complicated by amended pleadings. Amendments tend to confusion, embarrassment, and delay in the trial and disposition of a cause, and often occasion much inconvenience and expense to litigants. Where the amendments are numerous and lengthy, the difficulties are correspondingly increased.

The power to allow amendments is necessarily intrusted, in a large degree, to the discretion of the trial court, and should be liberally exercised, in furtherance of justice: Code, sec. 75. But when an application to amend is resisted, it should not be granted, except upon good cause shown, and upon such terms as the justice of the particular case may require. Adequate terms should be enforced, not merely as a matter of justice to the parties, but to the end that there may be more diligence in the preparation of causes, and the public business thereby expedited. The rapidity with which lengthy pleadings and other court papers may be manufactured (not prepared) through the agency of stenographers and type-writers, has tended of late years to burden the records of the courts with many crude and cumbersome documents.

As the court required plaintiff to pay two days' attendance of all the witnesses in this case as a condition to filing the second amended complaint, we cannot say its discretion was not properly exercised as to the terms imposed. The objection on the ground of misjoinder is not so easily disposed of.

2. Was there a misjoinder of parties defendant? The decision of this question involves a further examination into the subject-matter of the action, and particularly the situation of the premises and the claims of the respective parties as shown by the pleadings.

The plaintiff claims, among other things, that in May, 1883, he was, and for a long time prior thereto had been, and still is, the owner and in possession of a certain parcel of land in Garfield County, Colorado; that he first diverted and appropriated water from the Dry or West Fork of Elk Creek for the irrigation of said land and for domestic purposes at the date aforesaid, and has continued so to do since said time; that he diverted the water from said stream, and conveyed the same to his land by means of a certain ditch originally constructed upon the public domain; that while he was using said ditch, for the purposes aforesaid, in April, 1885, the dam which

turned the water into the head-gate of the ditch was washed away, and the channel of said stream was so cut out, lowered, and otherwise changed that he was obliged to remove the head-gate and extend the ditch up said creek, in order to secure a sufficient flow of water into said ditch; that between May, 1883, and April, 1885, the defendants Albert and George Saint had acquired certain lands above the land of plaintiff on said ditch and stream, and that the ditch so used by plaintiff to carry water to his premises extended across the lands of said Saint brothers; that plaintiff removed the head-gate and extended the ditch across the premises of the Saint brothers with their permission, without any objection or hindrance from them or either of them, and that he used the water so appropriated through said ditch for the years 1885, 1886, and during the first part of the season of 1887, and until prevented by defendants herein from so doing; that plaintiff gave the Saint brothers permission to conduct water through said ditch for the irrigation of their lands on condition that they would use said ditch only when the same was not being used by plaintiff; that the lands claimed and occupied by the Saint brothers are situate up said stream above the plaintiff's land, and that after the appropriation of water through said ditch by plaintiff, the defendants William and John Mansfield located, claimed, and now occupy a certain tract of land lying up said stream, and above the land claimed by the Saint brothers, and above the head-gate of said ditch; that plaintiff has a priority of appropriation of the waters of said natural stream for the irrigation of his said lands over each and all of the defendants, and that the waters of said stream are not sufficient for the use of plaintiff and defendants; that the said four defendants above named, well knowing the rights of plaintiff, and disregarding the same, have diverted the water from said stream, stopped the flow thereof, and are now diverting and stopping the flow thereof, so that the same cannot reach plaintiff's premises, to the great injury of the plaintiff, etc.; that irreparable injury will be done to plaintiff's crops, unless defendants be restrained, etc. Prayer for injunction, etc.

It does not appear that the Saint brothers, or either of them, acted, jointly or in concert with the Mansfield brothers, or either of them, in diverting the waters as charged. The Mansfield brothers diverted the water from the natural stream above plaintiff's head-gate for the purpose of irrigating lands their situate, while the Saint brothers diverted the water from

the artificial stream, or ditch, for the irrigation of their own lands upon a claim of right to said ditch for that purpose.

Upon the facts as above stated, it is earnestly and ably contended by counsel for appellants that there is no joint liability on the part of defendants, even if plaintiff is entitled to the prior right over each and all of them to the use of the waters of the natural stream. Counsel do not cite authorities upon this point, though general language may readily be found in the text-books and in judicial opinions favoring the view for which they contend. Such is the purport of the opinion in *Keyes v. Little York etc. Co.*, 53 Cal. 724. That case, however, is not altogether analogous to the present; the case of *Hillman v. Newington*, 57 Cal. 56, is more nearly analogous; but the decision in the latter case sustains the view that there is no misjoinder of parties in the present action. The latter case was decided in 1880, and in concluding the opinion the court remarked: "The case, so far as we are advised, is *sui generis*. No parallel case is cited by either side."

In the case of *People v. Gold Run etc. Co.*, 66 Cal. 149, 56 Am. Rep. 80, decided in 1884, it was said that the *Keyes* case "was practically overruled" by the *Hillman-Newington* case.

Interference with the prior right of a party to the use of water for irrigation is unlike most private injuries, for which relief may be had by injunction. Priority of right to the use of water from a natural stream is a right peculiar in its nature. A party entitled to such priority, unless he can show that he is entitled to all the water of the natural stream, cannot, in the nature of things, identify certain specific water as belonging to himself, while the same is running in the natural channel. Being entitled only to a certain quantity of the water, less than the whole, it is only after a proper diversion of such quantity into his own separate ditch or lateral that the prior appropriator can be said to have title, in kind, to the specific water thus diverted: *Wheeler v. Northern Colorado Irr. Co.*, 10 Col. 587, 588; 3 Am. St. Rep. 603. So long as the prior appropriator is able to secure the full amount of water to which he is entitled, he will not be heard to complain that some other person or persons, located higher up the stream, are diverting its waters.

3. Keeping this principle in view, it follows that if plaintiff had, by "priority of appropriation," actually acquired "the better right" to the use of the water of the natural stream than either or all of the several defendants, he was entitled to

have such priority protected against their acts, whether joint or several, and for that purpose was entitled, if necessary, to join them all as defendants in one action. Plaintiff did not claim a prior right to the use of all the water in the natural stream, and the amount diverted by any single defendant might not interfere with plaintiff's use. Hence he might not be able to maintain an action against any one of the defendants separately for diverting the water. So plaintiff might not be able to show that any two or more of the defendants acted jointly in diverting the water; nevertheless, he might be able to show that the result of their several diversions in the aggregate was to deprive him of its use altogether. The joint result of their several acts would, under such circumstances, justify their joinder as defendants.

To illustrate, let us suppose that the natural flow of water in the West Fork of Elk Creek is only two hundred inches, and that plaintiff, as the prior appropriator, is entitled to one hundred inches thereof. Mansfield, owning lands on said stream above plaintiff, diverts one hundred inches of the water; Saint, next below Mansfield, but still above plaintiff, diverts another one hundred inches; thus it results that plaintiff is wholly deprived of the use of the water, though he is the actual prior appropriator thereof. To obtain redress, plaintiff commences his action by injunction against Mansfield. The action is resisted; Mansfield shows that he leaves water enough in the natural stream for plaintiff; and thus plaintiff is defeated, unless he assumes the burden of proving that Mansfield's appropriation is junior to Saint's, — a matter in which plaintiff has no interest. The same result follows if Saint be sued separately; and thus the party actually having the better right is prevented from maintaining it. To prevent a failure of justice in cases of this kind, the prior appropriator cannot properly be required to assume any such risks or burdens. But he may bring and maintain an action jointly against all parties junior in right to himself, whenever the result of their acts, either joint or several, deprives him of his better right to the use of the water, or substantially interferes therewith. He may thus secure protection to his own priority, and leave the several junior appropriators to settle their relative priorities among themselves.

Upon plaintiff's theory, we have no hesitation in saying that there was no misjoinder of parties defendant. The theory of the Saint brothers, that they were the owners of the

ditch, and therefore entitled to control the same, to the exclusion of plaintiff, must be regarded as involving a question of fact. The evidence upon such question was conflicting, and the finding of the trial court thereon cannot properly be disturbed on this appeal.

4. Whether plaintiff had or had not acquired a right of way for the irrigation ditch across the lands of the Saint brothers was a question of fact to be determined by the trial court upon the evidence. It is idle to say that the court could not determine whether such right of way did or did not exist, for the reason that this was not a proceeding under the act of eminent domain. The court did not undertake to grant a right of way, as by a decree or rule in condemnation proceedings; the finding of the court was to the effect that plaintiff was in the possession and enjoyment of such right of way as an existing right antecedent to the commencement of this action.

It appears that the ditch was originally constructed through the unsurveyed public domain of the United States. It was constructed before any of the parties to this litigation owned any of the ranches now claimed by them respectively. The Saint brothers claimed the ditch by virtue of a purchase of the possessory title of the former occupants. This claim was controverted by plaintiff; and the issue being decided by the trial court, upon conflicting evidence, in favor of plaintiff, its decision will not be disturbed.

5. Certain rulings of the court, occurring at the commencement and during the progress of the trial, are assigned for error.

The court called a jury to try such specific questions of fact as might be submitted to them, reserving to itself the power to make its own findings upon consideration of the evidence and the verdict of the jury. This was correct practice, the case being one of equitable cognizance, and triable by the court either with or without the aid of a jury, under the statute: Code, sec. 178; 1 Thompson on Trials, sec. 884; *Abbott v. Monti*, 3 Col. 561; *Hall v. Linn*, 8 Col. 267.

6. The defendants the Saint brothers demanded a separate trial, which was refused. A separate trial for the several defendants in a civil action is certainly not a matter of right, and it was not error for the court to refuse the demand.

4. It was not error for the court to refuse defendants' request to have the jury view the premises and ditch in dis-

pute. The granting or refusing of such request was a matter resting in the sound discretion of the trial court: Code, sec. 188.

8. The action of the court in propounding to the jury certain questions, as requested by plaintiff, is assigned for error. It would seem that the court extended great indulgence to the parties in the matter of submitting questions to the jury. The record does not affirmatively show that the parties were allowed to ask as many questions as they pleased, but it does show that twenty-five questions on behalf of plaintiff, and twenty more on behalf of defendants, were duly submitted to the jury. Without discussing these questions in detail, we feel constrained to suggest the impropriety of submitting so many questions to the jury in an action of this kind. The right to require certain specific questions of fact to be passed upon by the jury is a matter for the court: Code, sec. 199. Counsel cannot insist upon the privilege *ad libitum*. The number and character of the questions should be controlled within reasonable limits, or the jury may be confused, and the court embarrassed, rather than aided, by the practice.

9. The calling of the jury was a matter of discretion with the court; their verdict or answers were only advisory; and as the court, by its own specific findings, determined every material matter in issue, neither the questions to nor answers by the jury furnish sufficient ground for a reversal of the findings and judgment of the court. Considering the nature of the action, and that only certain specific questions of fact were required to be answered by the jury, subject to the power of the court to accept or reject the answers in whole or in part, it was not error for the court to refuse to give instructions to the jury. The requirements of section 187 of the Code, in reference to instructions, are applicable to causes or issues triable by jury as a matter of right. The case of *Welch v. Watts*, 9 Ind. 115, cited by appellants' counsel, is not a case of this character. But see *Danielson v. Gude*, 11 Col. 96, and authorities there cited.

The judgment of the district court might have been affirmed, but for the fact that the court erred in determining the amount of plaintiff's prior appropriation through the irrigating ditch in controversy. By his amended statement the plaintiff claimed the prior right to the use of one hundred inches of water from the Dry or West Fork of Elk Creek, to be conveyed

through said irrigating ditch. The jury made no findings as to the amount of this claim; the court, however, allowed the full amount of the plaintiff's claim; but from the evidence, in which there is little or no conflict, it is manifest that the plaintiff never actually applied to beneficial use more than sixty inches of water prior to the defendants' appropriation. The judgment of the district court will therefore be reversed, with directions to that court to enter judgment awarding plaintiff a priority of appropriation as against the defendants for sixty inches of water from said West Fork of Elk Creek through said irrigating ditch.

WATERS AND WATERCOURSES. — RIGHTS OF PRIOR APPROPRIATORS TO ENJOIN DIVERSION: See notes to *Strickler v. Colorado Springs*, 25 Am. St. Rep. 234; *Atchison etc. R. R. Co. v. Long*, 26 Am. St. Rep. 167; *Ulbricht v. Esfauila Water Co.*, 11 Am. St. Rep. 78; *Alta Land and Water Co. v. Hancock*, 20 Am. St. Rep. 225. Injunction will issue without proof of actual damages: *Spar-gur v. Heard*, 90 Cal. 222.

WATERS AND WATERCOURSES. — RIGHT OF PRIOR APPROPRIATOR TO JOIN SEVERAL JUNIOR APPROPRIATORS in a petition for an injunction against an interference with a water right is an application of the general rule, that to prevent multiplicity of suits, where one has a right which various persons may contest in different actions, equity will lend its aid, and direct an issue to try the right: *Morgan v. Morgan*, 3 Stew. 383; 21 Am. Dec. 638; *Van v. Hargett*, 2 Dev. & B. Eq. 31; 32 Am. Dec. 689. The converse conditions to those in the principal case, as regards parties, are illustrated in *Foreman v. Boyle*, 68 Cal. 290, where it was held that the several owners of the waters of a stream may unite as plaintiffs in an action to restrain a diversion of the waters by a third person; but that they cannot unite in an action for damages.

RIGHT OF WAY FOR AN IRRIGATING DITCH MAY BE CONDEMNED in favor of a private party: *Downing v. More*, 12 Col. 316.

JURY IN EQUITY CASES can be used only by submitting single issues of fact, and the jury cannot foreclose the equity judge in his conclusion, unless his judgment is convinced: *Brown v. Buck*, 75 Mich. 274; 13 Am. St. Rep. 433. Calling such a jury is discretionary with the court, and not a matter of right in the parties: *Van Fleet v. Olin*, 4 Nev. 95; 97 Am. Dec. 513.

VIEW BY JURY: See note to *Erwin v. Bulla*, 92 Am. Dec. 342-345.

STEPHENS v. CLAY.

[17 COLORADO, 489.]

TRUST DEEDS GIVEN AS SECURITY, AND MORTGAGES containing a power of sale, vest the legal title in the trustee, while the equity of redemption or equitable title remains in the mortgagor or trustor.

TRUSTEES — RIGHT TO SELL AND CONVEY. — A trustee under a trust deed or mortgage containing a power of sale is vested with authority, so long as he retains the legal title, to convey the equitable title of the trustor or mortgagor, upon default of the mortgage debt, and upon proper advertisement and sale.

TRUSTEES — IRREGULAR SALE AND CONVEYANCE BY — EFFECT OF. — A trustee may divest himself of the legal title without compliance with the conditions of the trust, but a sale and deed, except in strict compliance with such conditions, is of no effect whatever, so far as the trustor's equitable estate is concerned, and if the trustee, in disobedience of the trust conditions, by deed transfers the legal title, his grantee takes only the trustee's interest.

TRUSTEES — IRREGULAR SALE AND CONVEYANCE BY — EQUIFABLE RELIEF. — When a trustee has sold and conveyed the trust property without complying with the conditions of the trust, a court of equity will execute the trust, either by a regular foreclosure and sale, or by a decree requiring the trustee to execute the power in accordance with the terms of the trust, or by appointing a new trustee, and devolving upon him the execution of such power.

TRUSTEES' SALES — SECOND CONVEYANCE BY TRUSTEE — EFFECT OF. — When a trustee has sold and conveyed the trust property without complying with the terms of the trust, the power of sale is extinguished, so far as he is concerned; and an effort on his part to exercise the power originally vested in him, by an attempted resale or second deed, in compliance with the conditions of the trust, is absolutely void.

DEED SUBJECT TO MORTGAGE — EFFECT OF. — When a conveyance of an entire estate is made, subject to a mortgage, the grantee takes only the equity of redemption, in the absence of specifications in the deed or of proof *aliunde* to the contrary.

DEED SUBJECT TO MORTGAGE — SATISFACTION OF MORTGAGE DEBT. — When an estate subject to a mortgage is sold by the mortgagor in parcels at different times, the mortgage must be satisfied, first out of that portion of the estate still in the hands of the mortgagor, and then out of the parcels sold, in the inverse order of alienation. This rule may be modified by recitals in the deeds showing a different intent.

DEED SUBJECT TO MORTGAGE — RIGHTS OF MORTGAGEE — SATISFACTION OF MORTGAGE. — When an estate subject to a mortgage is sold by the mortgagor in parcels, no right of the mortgagee is disturbed by these transactions, save that under some circumstances a court of equity may require him, first, to exhaust the parcel retained by the mortgagor, or the parcels conveyed, as the case may be, in satisfaction of his mortgage debt, according to the intent of the parties.

TRUSTEES' SALES — CAVEAT EMPTOR. — The rule of *caveat emptor* applies to trustees' sales, and the purchaser, whether the mortgagee or a stranger, is, in proceedings by a party injured, conclusively charged with notice of irregularities by the trustee in executing the power of sale.

ACTION to quiet title. Daniel Clay, as owner of the property in dispute, executed and delivered to one J. R. Ives, as trustee, a trust deed containing the usual power of sale, to secure to plaintiff, Stephens, the payment of one thousand dollars. Afterward, Clay conveyed an undivided one half of the land in controversy to Mary B. Clay, "subject to a total encumbrance of one thousand dollars and accumulated interest." Subsequently, and after default in payment of said indebtedness secured by the trust deed, the trustee, Ives, sold the land to plaintiff, Stephens, giving but eighty-nine instead of ninety days' notice, as required by the terms of the trust deed. Clay then quitclaimed the whole of his interest in the land to Stephens. A few days thereafter, Ives discovered his error in the notice of sale, and proceeded to resell, giving full notice, and complying strictly with the terms of the trust. At this sale Stephens purchased, and Ives executed and delivered to him a second deed. The defendant, Mary B. Clay, answered, alleging title to one half the land, and also demanded affirmative relief by cross-complaint. Judgment for defendant, and plaintiff appealed.

R. H. Gilmore, for the appellant.

J. H. Reddin, for the appellee.

HELM, J. In response to the preliminary objection urged by counsel for appellee, we suggest, that while a general assignment of error challenging the charge as a whole or the rulings *en masse* in admitting or rejecting testimony would be defective, yet where, as in the present case, the judgment or decree is questioned on the ground that it is not supported by the evidence, or that it is contrary to law, such an assignment may be sufficient. The assignments before us might have been more specific and elaborate; but they are not so imperfect as to justify our refusal to consider the merits of the controversy.

The decision of the case at bar depends upon the effect of the first attempted sale and deed by the trustee. That there was a fatal error on his part in advertising the sale is not questioned; but if the deed executed in pursuance thereof conveyed the trustee's legal title, his subsequent attempted sale and deed were ineffectual to destroy appellee's right of redemption. If, on the contrary, the trustee's first deed was of no force or effect whatever for any purpose, the legal title

remained in him, and his second sale and deed being regular, divested appellee's equity of redemption.

Trust deeds given as security, and mortgages containing a power of sale, vest the legal title in the trustee. The equity of redemption or equitable title remains in the mortgagor or "trustor," i. e., the owner. The legal title of the trustee is supplemented by a power which authorizes him, upon default in payment of the mortgage debt, to advertise and sell the property; the right to exercise this power, as we shall presently see, being dependent upon his possession of such legal title. The object of the power of sale is not to enable him to convey the legal title vested in himself, but to clothe him with authority to sell and convey the equitable title remaining in the trustor. He may divest himself of the legal title without compliance with the conditions of the trust. But a sale and deed, except in strict compliance with the power specified, is of no effect whatever, so far as the trustor's equitable estate is concerned. If the trustee, in disobedience of the trust conditions, by deed transfer the legal title, his grantee takes only the trustee's interest. He steps into the trustee's shoes, so to speak, and holds subject to all reserved rights of the trustor. Neither courts of law nor courts of equity regard the trustee's deed as absolutely void. Both recognize the fact that it conveys the legal title. The difference is, that the grantee's title or ownership cannot be challenged at law, while equity treats him as a successor to the trust and protects the trustor's estate. Equity does not vacate the trustee's deed and regard the title as remaining in him. Appropriate equitable relief is usually obtained in one of the following modes: The cumulative remedy of a regular judicial foreclosure and sale is allowed; or a decree is entered requiring the grantee to execute the power in accordance with the terms of the trust deed as the trustee should have done; or the execution of the power is by decree devolved upon a new trustee appointed for the purpose. Upon delivery of his deed, the original trustee ceases, both at law and in equity, to have any further interest in the property. The power of sale is extinguished, so far as he is concerned, leaving him in the same position as a total stranger. And an effort on his part to exercise the power originally vested in him, by an attempted resale or a second deed, is of no more force or effect than if the same proceedings were taken by one who had never been connected with the title: *Koester v. Burke*, 81 Ill. 436; *Wells v. Caywood*, 3 Col.

487; *Doe v. Robinson*, 24 Miss. 688; *Huckabee v. Billingsly*, 16 Ala. 414; 50 Am. Dec. 183; *Taylor v. King*, 6 Munf. 353; 8 Am. Dec. 746; *Cranston v. Crans*, 97 Mass. 459; 93 Am. Dec. 106; *Fulton v. Johnson*, 24 W. Va. 95.

The foregoing views are also substantially recognized in the following works: Jones on Mortgages, 4th ed., c. 40; 2 Perry on Trusts, 3d ed., secs. 602 b et seq.; Judge Dillon in 2 Am. Law Reg., N. S., 650 et seq., 724 et seq.

Certain expressions used by the law-writers named touching the effect of the trustee's deed in "passing title," where the terms of the power have not been pursued, seem to be inconsistent with each other. But these apparent inconsistencies vanish as soon as the doubtful expressions are properly understood. Upon critical examination it appears that when the learned writers declare that the trustee's deed under such circumstances passes no title (unless merely stating the conclusion reached in certain exceptional cases hereinafter noticed), they refer to the equitable estate of the trustor; while, of course, the declaration, frequently employed, that at law the title passes to the grantee, always relates to the title of the trustee; though it also contemplates the fact that, as a rule, in legal actions, equitable estates are not considered.

We do not say that the views above stated are universally adopted. There are able decisions which hold that the deed of the trustee made in pursuance of an irregular sale is itself void, and does not divest his legal title. These decisions either affirmatively declare or logically sanction the doctrine that the trustee, under such circumstances, retains the authority originally embodied in the power, and upon discovery that the sale is defective, may proceed to resell the property; likewise, as both a legal and a logical sequence, that if the new proceeding be in full compliance with the conditions of the power, the trustee's second deed operates to convey the equitable title of the trustor: *Ohnsorg v. Turner*, 13 Mo. App. 533; *Enochs v. Miller*, 60 Miss. 19; *Bottineau v. Etna Life Ins. Co.*, 81 Minn. 125; *Ohnsburg v. Turner*, 87 Mo. 127. New York and Michigan announce a similar rule; but in those states the invalidity of a trustee's deed made in pursuance of a defective sale is declared by statute.

The authorities last above mentioned would hardly be followed, were the subject one of first impression in this state. And we are certainly not prepared to overrule *Wells v. Caywood*, 3 Col. 487. That case, so far as it goes, is in accord with

well-reasoned opinions, and the view taken, as already indicated, harmonizes with the one more widely prevailing. The cases of *Bigler v. Waller*, 14 Wall. 297, and *Shillaber v. Robinson*, 97 U. S. 68, so confidently relied on by counsel for appellant, when carefully examined, do not sustain his contention. The emphatic language employed in those decisions by which a sale without the requisite notice is declared "a mere nullity, disturbing no right and conferring none," refers to the rights of the original trustor or mortgagor. Both suits were in equity, and the learned judges were not considering the effect of the trustee's deed upon his legal title.

This court has announced a similar doctrine touching deeds executed by trustees holding title to town sites under government patent, in disregard of the conditions of the trust: *Smith v. Pipe*, 3 Col. 187; *Filmore v. Reithman*, 6 Col. 120; *Murray v. Hobson*, 10 Col. 66. The legal status of town site and mortgage trustees is not in all respects the same. But sufficient analogy exists to justify a reference to the case mentioned by way of illustration, though not strictly as precedents.

It follows from the foregoing conclusions that the deed made by Ives on the 13th of May, 1885, though ineffectual to extinguish the rights of the trustor, yet conveyed the legal title to the grantee named. It likewise follows therefrom that the second sale by Ives, and the deed executed in pursuance thereof, were of no force or effect whatever. The legal title by virtue of the first trustee's deed was vested in Stephens, subject to the conditions of the original power. Undoubtedly, the quitclaim deed of D. R. Clay, the original trustor, conveyed to Stephens his remaining interest in the property. But it does not appear that Mary Belle Clay directed or consented to the second attempted sale; and neither the quitclaim deed of D. R. Clay, nor anything else of which we are advised, divested the right of redemption as to one half of the property held by her under her deed of October 8, 1883. At the commencement of this suit, therefore, no effort having been made by Stephens, in the mean time, to execute the power specified in the original trust deed, or to cut off the estate of Mary Belle Clay through a judicial foreclosure, she was still entitled to exercise the right of redemption; i. e., to procure a reconveyance from Stephens of the legal title to one half of the premises upon tender of the amount of the original loan, with interest, or of such proportion thereof, if any, as her estate is liable for.

This brings us to the second important question submitted. Appellant's counsel contends that if the second attempted sale by Ives, the trustee, did not extinguish the equity of redemption of appellee, her moiety of the property is primarily liable for the payment of the entire mortgage debt; appellant's half being holden only for the balance, if any, remaining unpaid after exhausting appellee's interest.

Where a conveyance of the entire estate is made subject to a mortgage, in the absence of specifications therein or of proofs *aliunde* to the contrary, the grantee takes simply the equity of redemption: *Winans v. Wilkie*, 41 Mich. 264; *Fiske v. Tolman*, 124 Mass. 254; 26 Am. Rep. 659; *Woodbury v. Swan*, 58 N. H. 382; 1 Jones on Mortgages, sec. 736.

But where the mortgagor, instead of conveying the whole, conveys by warranty deed a part of the mortgaged premises, an "inequality of equities," as it is termed, between himself and his grantee is introduced. The general rule applicable to such cases, as stated by this court, is, that "where an estate is subject to a mortgage, and is sold by the mortgagor in parcels at different times, the mortgage shall be satisfied, first, out of that portion of the estate still in the hands of the mortgagor, and then out of the parcels aliened, in the inverse order of alienation": *Fassett v. Mulock*, 5 Col. 466. This rule, however, may be modified by recitals of the deed: *Pomeroi's Eq. Jur.*, sec. 1225. And it is for the courts, in each particular case, where reference to the mortgage is made in that instrument, to determine the intent of the parties as expressed by the language they use.

The deed from D. R. Clay to appellee does not, in our judgment, indicate a purpose to subject the estate of appellee primarily to the payment of the entire debt. This deed conveys to appellee an undivided half-interest in each of two different parcels of lots, each parcel being encumbered. The language in the granting clause of the deed, "the above subject to a total encumbrance of one thousand dollars, and accumulated interest," simply declares that the particular parcel of lots referred to was burdened with this encumbrance. Had the intention been to say that the undivided half-interest in those lots conveyed to appellee should be primarily liable for the payment of the whole encumbrance, different phraseology would have been employed.

On the other hand, we cannot concede the correctness of the view taken by the trial court, that the interest retained

by D. R. Clay, and now vested in appellant, is primarily bound for the entire debt. The rule stated in *Fassett v. Mullock*, 5 Col. 466, and in similar decisions, contemplates cases where a warranty deed is executed conveying the fee to a parcel of the mortgaged premises, without mention of the mortgage. It is apparent that the instrument now under consideration is not such a deed. The encumbrance is expressly referred to in both the granting and *habendum* clauses. By the former clause the conveyance is affirmatively made subject to the mortgage; by the latter clause the mortgage is specifically excepted from the covenant of warranty. Considering the instrument as a whole, we think the intent of the parties was simply to leave undisturbed, as between themselves, the lien of the mortgage upon the entire premises, including the moiety conveyed, and thus to preserve an equality of equities in this respect. Hence appellee took a title burdened with the mortgage; and if she will assert her right to redeem, she must pay appellant one half of the original mortgage debt, with interest: *Briscoe v. Power*, 47 Ill. 447; *Hoy v. Bramhall*, 19 N. J. Eq. 74; *Slater v. Breesee*, 36 Mich. 77; *Drury v. Tremont Imp. Co.*, 13 Allen, 168; 1 Jones on Mortgages, sec. 736; 2 Washburn on Real Property, 4th ed., 208, sec. 6 a.

It is hardly necessary to add, in conclusion, that no right of the *cestui que trust*, or mortgagee, is disturbed by the foregoing transactions; save that under some circumstances equity may require him first to exhaust the parcel retained, or the parcel conveyed, as the case may be, in satisfaction of his mortgage debt. Nor is it necessary to specifically declare what is assumed in the above discussion, that the doctrine of *caveat emptor* applies to trustee's sales; and that the purchaser, whether he be the mortgagee or a stranger, is, in proceedings by a party injured, conclusively charged with notice of irregularities by the trustee in executing the power of sale.

The decree of the court below is reversed, and the cause remanded, with directions that a new decree be entered in accordance with the views herein expressed.

TRUST DEEDS—TITLE OF TRUSTEE UNDER.—An instrument which conveys to the grantee the legal title to the property therein described upon certain trusts, and which confers upon him the power to sell the same, and transmit the legal title to his grantees, is a trust deed: *More v. Calkins*, 95 Cal. 435; 29 Am. St. Rep. 128.

TRUST DEEDS—CONVEYANCES BY TRUSTEES—TITLE CONVEYED.—A trustee under a deed giving him power to sell and convey can sell and con-

vey such title only as is vested in him by his conveyance: *Barnard v. Duncan*, 38 Mo. 170; 90 Am. Dec. 416, and note. See extended note to *Gale v. Mensing*, 64 Am. Dec. 199.

TRUSTS — SALES BY TRUSTEES — CAVEAT EMPTOR. — In sales by trustees, the rule of *caveat emptor* applies: *Sutton v. Sutton*, 7 Gratt. 234; 56 Am. Dec. 109, and note; *Barnard v. Duncan*, 38 Mo. 170; 90 Am. Dec. 416, and note, with cases collected.

TRUSTS — EFFECT OF IRREGULAR SALES BY TRUSTEES. — The conduct of trustees in the management and disposition of trust property must be regulated and controlled by the terms of the deed of trust, and any disposition of the property contrary to its provisions will be void: *Hunt v. Townshend*, 31 Md. 336; 100 Am. Dec. 63, and note; *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 270, and note; *Maxwell v. Barringer*, 110 N. C. 76; 28 Am. St. Rep. 668, and note. See extended note to *Tyler v. Herring*, 19 Am. St. Rep. 266-297, and particularly 273.

DEED SUBJECT TO MORTGAGE — RIGHTS OF PARTIES. — The grantee of mortgaged premises who does not covenant to pay the debt takes the premises subject to encumbrances, but incurs no personal liability: *Klipsworth v. Dressler*, 13 N. J. Eq. 62; 78 Am. Dec. 69, and extended note, in which the rights and liabilities of the parties to such a transaction are discussed. See note to *Gifford v. Corrigan*, 15 Am. St. Rep. 514; note to *Berlack v. Halle*, 1 Am. St. Rep. 189.

COLORADO MIDLAND RAILWAY CO. v. NAYLON.

[17 COLORADO, 501.]

MASTER AND SERVANT — RISKS ASSUMED BY AND CARE DUE TO SERVANT ENGAGED IN CONSTRUCTION OF RAILROAD. — A railroad employee engaged in constructing the road assumes greater risks from a defective track than one passing over the road after its full completion and equipment, but the former has the right to expect a degree of care and skill from the company equal to that ordinarily exercised during the progress of railroad construction, and the company is not exonerated from liability for injuries inflicted on him, through a risk that must be regarded as extraordinary and unusual.

MASTER AND SERVANT — RISK NOT ASSUMED BY SERVANT. — The single spiking of three ties and the entire failure to spike the fourth tie to the rails upon a curve in a railroad during the course of its construction is such negligence toward an employee engaged in such construction work, in exposing him to an extraordinary and unusual hazard not contemplated in his employment, as renders the company liable for injury resulting to him therefrom.

MASTER AND SERVANT — VICE-PRINCIPAL AND FELLOW-SERVANTS. — The mere fact that the servant whose negligence produces the injury is superior in rank to the servant injured does not alone fix the liability of the master. If the negligent servant can fairly be said to take the place of the master, and represent him so as to become in reality a vice-principal, and the negligence occurs in the discharge of his representative duties, the master is liable.

MASTER AND SERVANT — FOREMAN AS VICE-PRINCIPAL. — A general foreman of men engaged in railroad construction, such men being subject to his immediate control, employment, and discharge, while he has control of the trains and appliances used in the work of construction, subject to the superintending direction of the general superintendent of construction when present, is a vice-principal during the absence of such superintendent, so as to make the company liable for his negligence toward one of the men under his control and direction.

ACTION to recover damages for personal injury to the appellee, Naylor, while engaged as a common laborer in bedding ties for the appellant railroad company. Judgment for plaintiff, and defendant appeals.

A. E. Pattison and H. T. Rogers, for the appellant.

J. S. Jones, for the appellee.

HELM, J. While the engineer in charge of the construction train attributes the accident resulting in appellee's injury to a peculiarity of the locomotive-wheels, the strong preponderance of evidence sustains the view adopted by the court below.

We must assume, and in fact the case is argued by counsel for appellant on the assumption, that the accident was due to the defective spiking of the ties upon the curve where the cars were derailed. That the track was thus left in a peculiarly dangerous condition, especially considering the size and weight of the locomotive in use, the evidence abundantly attests.

Plaintiff had nothing whatever to do with the spiking. He did not even walk over the rails after they were spiked. He had once ridden over the curve, but witnesses testify that in so doing he could not have observed the defects. The dangerous condition of the road at the point in question was therefore a fact concerning which no presumption of knowledge on his part attaches.

Counsel for appellant rely upon two propositions: 1. That plaintiff's injury was occasioned by one of the ordinary dangers incidental to his employment; 2. That if the injury resulted from negligence, such negligence was the negligence of a fellow-servant, — a risk also contemplated by his contract.

That appellee, in passing to and from his work over newly constructed pieces of road, assumed greater risks than would another servant, whose duty took him back and forth over the same line of track after its full completion and equip-

ment for passengers, cannot be questioned. But appellee's contract did not exonerate the company from liability for injuries suffered through a risk that, in the light of the circumstances, must be regarded as extraordinary and unusual.

He had an undoubted right to expect a degree of care and skill equal to that ordinarily exercised during the progress of railroad construction: *Colorado Midland R'y Co. v. O'Brien*, 16 Col. 219. The record shows very clearly that such care was not taken in the present instance, and that the accident resulted from its omission. The single spiking of three ties and entire failure to spike the fourth tie upon such a curve appears by the evidence to have been negligence which exposed appellee to an extraordinary and unusual hazard,—a hazard that was not contemplated in his employment. The testimony of appellant's own witnesses shows that this was the only curve of like magnitude during the building of the entire road where the rails were even temporarily left thus insecurely fastened. For months before, and always afterwards, the rails upon such curves were uniformly double-spiked to the ties.

The second objection, above stated, while perhaps a little more difficult to answer, is also, in our judgment, not well taken. It is urged that Nelson was the only man connected with the business who could be regarded as the vice-principal or general representative of the company; that Banker, so far as the company's liability is concerned, was merely a co-employee or fellow-servant with appellee; and that since Nelson exercised due care, the accident resulting from the disobedience of his orders by Banker, no liability attached to the company. This argument is plausible, and is not entirely unsupported by judicial decisions.

The mere fact that the servant whose negligence produces the injury is superior in rank to the servant injured does not alone fix the master's liability. The general powers vested in the superior servant, and the character of the specific act in connection with which his negligence occurs, are considerations rarely, if ever, omitted in pursuing the inquiry. The accepted general rule is, that where the negligent agent or servant can fairly be said to take the place of the master, and represent him so as to become in reality a vice-principal, and the negligence occurs in the discharge of his representative duties, the master's liability may attach. But the difficulty arises in determining what powers and duties constitute a

vice-principal in each particular case. Here is where the divergence among the more modern and better-considered cases begins. It is asserted that one is a vice-principal "to whom the master deposes the power of appointment and dismissal": Shearman and Redfield on Negligence, 3d ed., 103. But while the power of appointment and dismissal is undoubtedly an attribute of the master, its possession alone is by other authorities declared not to be always decisive. No satisfactory definition of the phrase "common employment" or the phrase "fellow-servant," used in this connection, can be laid down as an absolute guide in all cases: Beach on Contributory Negligence, sec. 115.

It is, however, unnecessary now to further pursue this general discussion. For the question, in so far as it relates to the case at bar, is practically *stare decisis* in this state. No doubt exists but that Nelson, the superintendent of construction, was a vice-principal and general representative of the company. But it does not follow from this fact that Banker was not also a vice-principal within the meaning of the authorities.

Banker and appellee were, in a certain sense, acting under a common employment, and laboring in the same general department or branch of the enterprise. But Banker was a general agent (whether we use the term "boss" or "foreman" is of no significance) in charge of the track-laying, a distinct department of the railroad construction; he had under him five different gangs of men, each gang being employed to perform a certain portion of the work, and being subject to the immediate control of its particular foreman, who was always present, watching the men and directing their labor; Banker had authority to hire and discharge both the men belonging to the gangs and the foremen respectively commanding the same; he controlled the trains, cars, tools, and other implements used in track-laying; he was subject to the superintending direction of Nelson when present, but during Nelson's absence, he seems to have had supreme control, so far as his department was concerned; his word was law, and the men in the different gangs, as well as their foremen, were bound to obey him. His negligence occurred in directing the foremen how certain work should be done. The particular act in connection with which the negligence occurred was of a general supervising nature. And Nelson being absent, Banker, for the time being at least, so far as

the department of track-laying was concerned, occupied his place.

To say that under these circumstances the company is absolved from liability for the negligence of Banker would be practically to ignore the recognized distinction between the negligence of a vice-principal and a fellow-servant proper. It would also operate to overrule former decisions of this court,—decisions where the circumstances presented were similar to those before us, and which, in effect, recognize the law substantially as above stated: *Colorado Midland R'y Co. v. O'Brien*, 16 Col. 219; *Denver etc. R'y Co. v. Driscoll*, 12 Col. 520; 13 Am. St. Rep. 243; *Colorado Central R. R. Co. v. Ogden*, 8 Col. 503.

The judgment of the court below is affirmed.

MASTER AND SERVANT—VICE-PRINCIPAL—LIABILITY FOR ACTS OF.—A master cannot, by delegating the performance of his duties to another, relieve himself from liability for injuries resulting from the failure of the vice-principal to exercise that degree of care which would have relieved the principal, had he undertaken the performance of the duty himself: *McElligott v. Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181, and note. See also extended note to *Adams v. Iron Cliffs Co.*, 18 Am. St. Rep. 455; *Consolidated Coal Co. v. Wombacher*, 134 Ill. 57.

MASTER AND SERVANT—VICE-PRINCIPAL—FOREMAN OF RAILROAD LABORERS AS.—A foreman having charge of laborers engaged in the removal of a railroad company's buildings is a vice-principal of the company, and not a fellow-servant of the laborers: *Sullivan v. Hannibal etc. R. R. Co.*, 107 Mo. 66; 23 Am. St. Rep. 388, and note, with cases collected; *Richmond etc. R'y Co. v. Hammond*, 93 Ala. 181.

MASTER AND SERVANT—ASSUMPTION OF RISK BY SERVANT.—A workman engaged in the construction of a railroad assumes the ordinary risks of such employment, including the risk of being transported to and from his work on a construction train over a newly constructed road, and cannot expect the road to be in the same safe condition before it is finished as if it had been completed and open for public travel: *Colorado etc. R'y Co. v. O'Brien*, 16 Col. 219. A section-hand, knowing the bad condition of the road over which he is accustomed to pass on a hand-car in going to and returning from his work, assumes the risk of passing over such defective way: *Green v. Cross*, 79 Tex. 130. For discussion of the general rule as to the assumption of risks by servants, see *Orman v. Mannix*, 17 Col. 564; post, p. 340, and note, with cases collected.

ORMAN v. MANNIX.

[17 COLORADO, 564.]

PLEADINGS—OBJECTION TO, WHEN MUST BE MADE. — All technical or formal objections to a pleading must be raised by motion or demurrer before trial, and if not so raised, they are deemed to be waived.

DAMAGES—PLEADING IN NEGLIGENCE CASE. — In an action by a father to recover damages for the death of his minor son, caused by negligence, a general allegation of damage is sufficient to authorize the recovery of such damages as naturally and usually flow from the death.

MASTER AND SERVANT—RISKS ASSUMED BY SERVANT. — When one engages in the service of another, he assumes, as between himself and his employer, all the ordinary and usual risks incident to the business upon which he is about to enter.

MASTER AND SERVANT—DUTY OF MASTER AS TO MACHINERY AND APPLIANCES. — Every master must exercise ordinary care, skill, and prudence in furnishing machinery and appliances suitable for doing the work in hand, and must exercise like care and caution in employing competent fellow-servants; and when others are given charge of the whole or a portion of the work, the master is required to use reasonable care and caution in the selection of competent assistants for such positions.

MASTER AND SERVANT—LIABILITY OF MASTER FOR ACT OF VICE-PRINCIPAL. — When a boy fourteen or fifteen years of age is engaged to work for his employer in a non-hazardous service, and is placed by his employer under the control and subject to the order and direction of a foreman, who orders him to do a thing which in its nature is perilous or hazardous to life or limb, and which is outside the duties and employment of the boy, but within the scope of the employment of the foreman, and in an attempt to perform such act in obedience to such order the boy is killed or injured, the giving of such order by the foreman is negligence for which the employer is liable, and the fact that the boy would have been justified in refusing to obey such order will not exonerate his employer from liability.

MASTER AND SERVANT—LIABILITY OF MASTER OR VICE-PRINCIPAL FOR ORDERING SERVANT INTO DANGER. — When a master wrongfully sends his servant into a dangerous place, or exposes him to a risk not connected with the service, in consequence of which he is injured, the master is liable; and if, instead of being thus sent by the master, he is sent by one whom the master has placed in authority over him, and to whose orders he is subjected, the liability of the master is the same.

MASTER AND SERVANT—VICE-PRINCIPAL, WHO IS— NEGLIGENCE TOWARD MINOR EMPLOYER. — A local boss, or foreman, with authority to control and direct the men and machinery employed, and to discharge such men at pleasure, is a vice-principal, and not a fellow-servant, and the master is liable for his negligence in ordering a minor employee into a situation of danger, and to perform an act entirely beyond the scope of his employment, if in obeying the order such employee is killed or injured.

MASTER AND SERVANT—MINOR EMPLOYEE—CONTRIBUTORY NEGLIGENCE, WHEN NOT IMPUTED. — Contributory negligence cannot be imputed to a minor employee of tender years in obeying orders, when he is not shown to have had any information with reference to the dangerous

nature of the business into which he was ordered by his superior, and which was entirely outside the services he was employed to perform.

INSTRUCTIONS — FAILURE TO NUMBER NOT ERROR. — When the instructions given are correct as matter of law, failure of counsel asking them to either number or sign them furnishes no ground for reversal.

ACTION by Mannix to recover damages for the death of his minor son, fourteen years of age, alleged to have been killed through the negligence of defendants. The defendants, Orman and others, were copartners and contractors, and at the time of the injury to said boy, who was in their employ, were engaged in constructing a railroad. The deceased was employed to carry water to the other hired men, and to carry their tools to and from defendants' blacksmith-shop when such tools needed repairing, and these were the only duties required of him. In doing the construction work a large amount of blasting-powder was used, and it frequently became frozen. It was the exclusive duty of one Riley, a boss of a gang of men, to thaw the powder and prepare it for use. On the day of the accident, Riley was engaged in thawing a large amount of powder about a fire built for that purpose. He picked up a quantity of the powder, and ordered the deceased to pick up some more of it from the fire and carry it to the place where it was to be used for blasting. When they had reached that place, Riley discovered that some of the powder left around the fire had ignited, and he ordered the deceased to run and throw the burning powder away. Upon receiving this command, the deceased ran toward the fire to execute the order. In a few seconds the powder around the fire exploded, resulting in the death of the boy. Other facts appear in the opinion. Judgment for plaintiff, and the defendants appealed.

J. E. Havens, for the appellants.

T. A. Dickson and S. D. Walling, for the appellee.

HAYT, J. The first assignment of error discussed by counsel relates to the sufficiency of the complaint. This question was not raised, however, in any way prior to the trial. The complaint certainly states facts sufficient to constitute a cause of action. A practice which would allow the raising of other objections to a pleading at the trial is not to be encouraged. Cases should be conducted in court with the least possible expense and annoyance to litigants consistent with the proper administration of justice. The Civil Code requires all mere

technical or formal objections to be raised by motion or demurrer before trial. If not so waived, they are to be deemed as waived. To wait until witnesses have been subpoenaed and the cause reached for trial before raising such objection would be to entail a needless expense upon litigants, as well as subject to unnecessary annoyance the court, witnesses, and jurors.

The claim in this case is, that certain allegations in the complaint are so vague and indefinite, and so interwoven with recitals, as to render the entire pleading objectionable. If the pleading is properly open to this criticism, and the defendants desired to have these allegations made more specific and definite, they might have filed a motion for that purpose, or a demurrer could have been interposed. The objection not having been taken by motion or demurrer, it cannot be considered in this court.

The additional claim that no recovery can be had in this case because the allegation of plaintiff's damages is general, and not special, is not well founded. The complaint avers the relationship of the plaintiff and the deceased, the latter's age at the time of his death, his occupation, and the amount of his daily earnings, the employment by the defendants, and the facts and circumstances of his death, as the result of the defendants' negligence, concluding with an averment of damages to the plaintiff in the sum of five thousand dollars. This is sufficient to permit the recovery of such damages as naturally and usually flow from the death, and these only are here claimed: *Tucker v. Parks*, 7 Col. 62; *City of Pueblo v. Griffin*, 10 Col. 366.

It is charged that the death of young Mannix resulted from the negligence of the defendants. The acts and omissions charged as constituting such actionable negligence may be briefly summarized as follows: 1. Failure to provide some suitable appliance for use in thawing, when frozen, the explosive used in blasting; 2. In ordering deceased, a lad of fourteen years, to do an act not within the scope of his employment, and extrahazardous in its nature.

We will be aided in solving the questions thus raised by having in mind the following principles of law applicable to the relations of master and servant. When one engages in the service of another, he assumes, as between himself and his employer, all the ordinary and usual risks incident to the business upon which he is about to enter.

The law imposes upon the master the duty of exercising

ordinary care, skill, and prudence in furnishing machinery and appliances suitable for doing the work in hand, and the exercise of like care and caution in employing competent fellow-servants; and where others are given charge of the whole or a portion of the work, the master is required to use reasonable care and caution in the selection of competent assistants for such positions.

In this case, it is earnestly contended that the defendants were chargeable with gross negligence in failing to provide some suitable appliance for thawing the powder when frozen. A number of witnesses were introduced, who testified that thawing such powder by an open fire was attended with unusual hazard and danger. It appears from the testimony of these witnesses that giant powder is composed of nitro-glycerin and an absorbent of different materials.

In the opinion of these witnesses, such explosive compound is liable to ignition and explosion from sparks from an open fire. It is further in evidence that it cannot be properly thawed in this way, for the reason that the heat could not be evenly applied to the powder, and thus the practice of thawing powder in this way was attended with great danger. It is in evidence that there is an appliance in ordinary and general use for thawing such powder, consisting of one vessel or tank inside of another, with space between in which to put water, the powder being placed in the inside tank, so that the heat of the water will gradually thaw it. In the opinion of such witnesses, there is little, if any, danger attended upon thawing powder in this manner. A number of witnesses testified, however, that such an appliance was not in general use; and a few, that it afforded but slight protection from the danger consequent upon handling so high an explosive, and that it was quite customary to thaw such powder before an open fire. It is said by these witnesses that such powder is exploded by a jar or concussion, rather than by heat, and consequently thawing by an open fire, in the opinion of these witnesses, is not attended by unusual hazard.

In this conflict in the testimony, it was the province of the jury to determine, under proper instructions, upon which side lay the greater weight. The instructions upon this point given by the able judge presiding at the trial are full and complete, and free from substantial error.

Finding the evidence amply sufficient to sustain a recovery

thereunder, the judgment cannot be disturbed, unless because of some other error occurring at the trial.

Such error is assigned upon the fifth instruction. In this they were instructed, in substance, that, as a general rule, a person entering into the employ of another is held to assume the ordinary risks incident to the service for which he is employed, including the risk of injury occasioned by the negligence of his fellow-servants. But if a boy fourteen or fifteen years of age is engaged to work for his employer in a non-hazardous service or occupation, and is placed by his employer under the control and subject to the orders and direction of a gang-boss, or foreman, and if such gang-boss, or foreman, order him to do a thing which is in its nature perilous or hazardous to life or limb, and which is outside of the duties and employment of the boy, but within the scope of the employment and duties of the gang-boss, and in attempt to perform such perilous and hazardous act, in obedience to such order, the boy is thereby killed, then the giving of such order by the foreman, or gang-boss, is negligence, and in such case the negligence of the gang-boss would be the negligence of the employer.

We think this instruction states the law correctly. The principles announced have received the sanction of many courts. And the instruction itself closely follows the opinion of the supreme court of the United States in *Railroad Co. v. Fort*, 17 Wall. 553. See also *Chicago etc. R'y Co. v. Bayfield*, 37 Mich. 205; *Chicago etc. R'y Co. v. Harney*, 28 Ind. 28; 92 Am. Dec. 282; *Gilmors v. Northern Pac. R'y Co.*, 18 Fed. Rep. 866; *Broderick v. Detroit Union Depot Co.*, 56 Mich. 261; 56 Am. Rep. 382; *Mann v. Oriental Print Works*, 11 R. I. 152; *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415; *Criswell v. Pittsburg etc. R'y Co.*, 30 W. Va. 798; *Shearman and Redfield on Negligence*, 3d ed., sec. 103; *Cooley on Torts*, 2d ed., 655 et seq.; *Lawson's Rights and Remedies*, sec. 321.

In the case of *Railroad Co. v. Fort*, 17 Wall. 553, the suit was brought by the father to recover damages for an injury to his sixteen-year-old son. The injuries were received while the son was in the employ of the railroad company, in one of its machine-shops, as a workman or laborer. This shop was under the superintendence of one Collett. Previous to the accident the boy had been chiefly engaged in receiving moldings from a molding-machine, and putting them away. After he had been engaged in this service a few months, Collett

ordered him to ascend a ladder to a great height from the floor, among dangerous machinery revolving at the rate of 175 to 200 revolutions per minute, for the purpose of adjusting a belt which was out of place. While executing this order, the boy was caught in the revolving machinery, receiving an injury from which he lost his arm. The case was originally tried before Judge Dillon and a jury. In instructing the jury, this able jurist drew a distinction between the liability of the employer in cases where the workman was performing services within the scope of his employment, and the case where the injury occurred where the workman was performing services outside of the scope of such employment by direction of one placed in authority over him by the company. A recovery was had in the court below and sustained upon appeal. In the case of *Chicago etc. R'y Co. v. Bayfield*, 37 Mich. 205, the superintendent of a construction train ordered a boy of seventeen or eighteen years of age — who appears to have been engaged as a common laborer — to go back to the rear end of the train and help stop the train. On his way back, in obedience to this order, he fell between the cars and was injured, for which injury he recovered judgment, although the boy had repeatedly performed a similar service upon previous occasions, by the direction of the superintendent. The opinion upon appeal was rendered by Chief Justice Cooley, and a recovery was sustained, upon the principle that if the master wrongfully sends a servant in a dangerous place, or exposes him to a risk not connected with the services, in consequence of which he is injured, the master is responsible; and that if, instead of being sent by the master, he is sent by one whom the master has placed in authority over him, and to whose orders he is subjected, the responsibility of the master is the same. This decision is quoted with approval in the eminent jurist's last edition of his work on torts: See Cooley on Torts, 2d ed., 656, 657.

In *Gilmore v. Northern Pac. R'y Co.*, 18 Fed. Rep. 866, the action was brought against the railway company by the plaintiff to recover damages for bodily injuries sustained by him while in the employ of defendant, as a laborer in the construction of its railway. The injury in that case resulted, as in this, from the explosion of a quantity of giant powder, in an attempt to thaw the same by an open fire.

The defendant had in its employ many gangs of men, num-

bering not less than fifty each, working at various points on its line, under the direction of a foreman, or local boss, having the power to employ and discharge men, but subject to a general superintendent, who, from time to time, passed along the lines, and gave the gang-boss instructions with reference to the work. These gangs were accustomed to use giant powder in blasting. This powder was under the immediate supervision and control of the gang-boss, whose duty it was to prepare the same for use when required. For the purpose of thawing such powder, the defendant had supplied heaters subject to requisition by the gang-bosses.

No such heater, however, had been supplied to the gang of which the plaintiff was a member, it being the custom of the foreman of this gang to thaw the powder by an open fire, calling to his assistance for that purpose one of the workmen. It was shown upon the trial that the superintendent knew of the danger of thawing powder in this way, and had given a general notice not to do it. The plaintiff was injured while assisting in so thawing powder by direction of the local boss, and it was held that for this purpose the local boss stood in the place of the defendant, and that his neglect in failing to procure and use a suitable appliance for thawing the powder was the negligence of the defendant.

It was further held that a direction from him to the plaintiff to assist in thawing the powder at an open fire was, under the circumstances, the direction of the company, and for which it was liable.

In opposition to the foregoing opinions, the case of *Murphy v. Smith*, 19 Com. B., N. S., 361, is frequently cited. Here the defendants were the proprietors of a match factory, the superintendent of which was one Simlack. Under Simlack there was a workman named Debour, who, in Simlack's absence, assumed the management of the establishment. In the manufacture of lucifer matches as at that time conducted, a dangerous mixture was compounded, in which the ends of the matches were dipped. In the compounding of this mixture, care was required in stirring it, otherwise an explosion was likely to take place. It was no part of plaintiff's duty to stir the compound. On the day in question he did, however, stir it, and the compound exploded, causing the injury complained of. The evidence shows that Debour was standing by at the time; but it did not appear that plaintiff was

acting under his direction in stirring the mixture, and there was no evidence to show that Simlack, the general manager, was not in the factory at the time, and hence it did not appear that plaintiff was even subject to the directions of Debour.

The case was submitted to a jury, and special findings returned. By these findings it appeared that, in the opinion of the jury, the injury occurred as the result of Debour's negligence, and that he was at the time acting as the manager of the establishment. A verdict for twenty pounds was returned for plaintiff. Upon appeal it was held that the evidence was not sufficient to sustain the finding that Debour was acting as general manager at the time, and that it could not therefore be fairly considered that he was then acting as the representative of the defendants; consequently it was held that the plaintiff could not recover.

An examination of the case discloses that it is in no way in conflict with the general rule upon the subject. A reading of the several opinions of the judges sitting in review leaves no doubt that if the plaintiff was under the direction or control of Debour, and acting under his orders at the time, the recovery would have been sustained.

In the case at bar it is expressly admitted in the pleadings that Riley, the local or gang boss for the defendants, had the entire direction and control of a division or gang of men working at the place of the accident, with power to discharge the men under him, at his pleasure. It is also admitted, likewise, in the pleadings that Riley had the entire charge of the giant powder used at that point, and that it was his duty to thaw the same when necessary. The evidence shows that, for the purpose of thawing the powder, he had authority to call to his assistance such laborers as he required. It is admitted that the thawing of this powder was entirely beyond the scope of young Mannix's employment. Under these circumstances, we think that the act of Riley in ordering Mannix to handle this dangerous explosive was the act of the company. No doubt the boy would have been justified in disobeying this order, but this fact will not exonerate the defendants. The deceased had a right to rely to some extent upon the superior skill and knowledge of the man put by them in charge of the work at that point. It would be unreasonable and unwarranted to require that a workman under such circumstances should be required to weigh nicely the ques-

tion as to whether or not the order was one which the foreman had a right to give.

If young Mannix had been a man of mature years, familiar with the dangers attendant upon handling giant powder, it might with some propriety be urged that in obeying such an order he was guilty of such contributory negligence as would bar a recovery. This cannot be urged against a mere boy of tender years, who is not shown to have had any information with reference to the dangerous nature of the business upon which he was ordered by his superior. Moreover, the question of negligence, and the correlative question of contributory negligence, were fairly submitted to the jury under proper instructions, and both issues decided against the defendants.

The deceased is shown to have been an active boy, diligent in serving his employers' interests, obedient to all the commands of his superiors. He was ordered to act in an emergency. This order was by a superior whom it was his general duty to obey. The deceased had neither time for the close weighing of chances, nor the opportunity to fully comprehend the danger of the service upon which he was dispatched. It is in evidence from some of the defendants' witnesses that giant powder might be warmed at an open fire without unusual risk; that, in fact, it would sometimes take fire and burn up without exploding. Under these circumstances, it should not be a matter of surprise that the jury found that deceased was not properly chargeable with contributory negligence.

Among the instructions given to the jury were embodied the statutes under which the action was being prosecuted. There was no error in this, particularly as the jury were properly informed as to the measure of damages in case the right of recovery should be sustained, the instruction upon this point having been prepared by the defendants' counsel and given at their request. For the correct rule of damages in this class of cases, and full discussion of the statute, see *Moffatt v. Tenney*, 17 Col. 189; *Hayes v. Williams*, 17 Col. 465. Some of the instructions given at the request of plaintiff were neither numbered nor signed, and error to the giving of such instructions is assigned on account of the omissions. Although the court, in its discretion, might have refused to consider such requests to instruct, it was not required to do so. When given, they became the instructions of the court, and might have been given upon its own motion. The instructions being

correct as a matter of law, the failure of counsel to either number or sign them furnishes no ground for reversal.

The case appears to have been tried with more than usual care, and we see no reason for interfering with the judgment. It is therefore affirmed.

MASTER AND SERVANT. — ASSUMPTION OF RISKS BY EMPLOYER: See note to *Augenstein v. Jones*, 23 Am. St. Rep. 182, where a large number of cases illustrating the principle that a servant assumes the ordinary risks of his employment are cited; *St. Louis etc. R'y Co. v. Davis*, 54 Ark. 389; 26 Am. St. Rep. 48; *Ell v. Northern Pacific R. R. Co.*, 1 N. D. 336; 26 Am. St. Rep. 621; *Jackson v. Missouri Pac. R'y Co.*, 104 Mo. 448; *Galveston etc. R'y Co. v. Arispe*, 81 Tex. 517; *Schaub v. Hannibal etc. R'y Co.*, 106 Mo. 74; *Brasil etc. Coal Co. v. Hoodlet*, 129 Ind. 327; *Knox v. Pioneer Coal Co.*, 90 Tenn. 546. But the rule does not apply when the servant was ignorant of the danger, and had no reasonable opportunity to know it: *McCormick v. Burandt*, 136 Ill. 170; and the servant has a right to presume that the master will provide such precautionary regulations as will not needlessly expose him to risks not necessarily resulting from his occupation: *Wild v. Oregon etc. R'y*, 21 Or. 159.

MASTER AND SERVANT — MASTER'S DUTY TO PROVIDE SAFE APPLIANCES AND COMPETENT CO-LABORERS. — A master must provide a reasonably safe place within which to work, reasonably safe appliances, and competent persons for his co-laborers, and the performance of these duties cannot be avoided by the simple giving of an order by which their execution is intrusted to another: *McElligott v. Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181; *Norfolk etc. R. R. Co. v. Nunnally*, 88 Va. 546; *Richmond etc. R. R. Co. v. Burnett*, 88 Va. 538; *Louisville etc. R'y Co. v. Graham*, 124 Ind. 89; *Louisville etc. R'y Co. v. Orr*, 91 Ala. 548; *Chicago etc. R. R. Co. v. Blevins*, 46 Kan. 370; *Ohio etc. R'y Co. v. Percy*, 128 Ind. 157; *McGovern v. Central Vt. R. R. Co.*, 123 N. Y. 280. The degree of care incumbent on the master is only ordinary: *Richmond etc. R. R. Co. v. George*, 88 Va. 223; *Brymer v. Southern Pac. Co.*, 90 Cal. 496; *Gulf etc. R'y Co. v. Johnson*, 83 Tex. 628. The master is not required to furnish the safest appliances: *Hatter v. Illinois Central R. R. Co.*, 69 Miss. 642; nor all the latest improvements: *Sappenfield v. Main Street etc. R. R. Co.*, 91 Cal. 48. The plaintiff must show by positive proof that the appliances were defective, and that the master had notice of the defect, or was negligently ignorant of it: *St. Louis etc. R'y Co. v. Rice*, 51 Ark. 467. When the master directs his servant to perform some service to which a particular risk is attached, which is not patent and open to the observation of any person exercising reasonable care, it is his duty to inform the workman of it, and caution him against it: *Holland v. Tennessee etc. R. R. Co.*, 91 Ala. 444. This duty is especially incumbent on him when the servant is young and inexperienced: *Cartier & Co. v. Cotter*, 88 Ga. 286; *Dowling v. Allen*, 102 Mo. 213; and see cases referred to in the note to *Hinckley v. Horazdowsky*, 133 Ill. 359; 23 Am. St. Rep. 618.

MASTER AND SERVANT. — VICE-PRINCIPALS, WHO ARE, AND HOW FAR THE MASTER IS LIABLE FOR THEIR NEGLIGENCE: See note to *Adams v. Iron Cliffs Co.*, 18 Am. St. Rep. 453-458. A person who is clothed by a corporation with the control and management of a distinct department, in which his duty is that of direction and superintendence, is a vice-principal: *Chicago etc. R. R. Co. v. Sullivan*, 27 Neb. 673. See also *McElligott v. Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181.

GORMAN v. PEOPLE.

[17 COLORADO, 506.]

OFFICERS DE FACTO — ACTS OF, CANNOT BE QUESTIONED. — When an office has been duly created, public policy often requires that the official acts of the person actually discharging the duties thereof shall not be questioned on the ground that such incumbent has no title to the office; but this rule always presupposes the existence of an office *de jure*.

COURTS DE FACTO. — Such a thing as a *de facto* court cannot exist, and consequently its judgments cannot be sustained.

JUDGMENT OF ABOLISHED COURT IS VOID. — A sentence imposed or judgment rendered by a court after it has been abolished by statute is void.

INSTRUCTIONS IN CRIMINAL CASES. — A charge to the jurors, in a criminal case, telling them that they must believe the defendant guilty of the crime charged, beyond a reasonable doubt, in order to convict, but omitting to tell them that their belief must be founded upon "all the evidence," is objectionable, but will not work a reversal of the verdict, in the absence of proof that the charge, as a whole, is not so clear in this respect as to mislead intelligent men.

H. E. Luthé, for the plaintiffs in error.

S. W. Jones, attorney-general, and *H. Riddell*, for the defendants in error.

HAYT, J. Plaintiffs in error, James J. Gorman *et al.*, were convicted in the court below of riot, and sentenced to confinement in the county jail of Arapahoe County for the period of sixty days. By an act approved April 19, 1889, the court in which the trial of defendants took place was abolished. This act contained no emergency clause, and under our constitution went into effect ninety days after its passage, to wit, on the eighteenth day of the succeeding month of July. These defendants were sentenced on the next day, July 19th.

The pretended judgment in this case cannot be allowed to stand. Where there is an office duly created, public policy frequently requires that the official acts of the person actually filling such office and discharging the duties thereof shall not be questioned on the ground that the incumbent has no title to the office. Were it not for this salutary rule of law, the administration of public affairs might be thrown into the direst confusion, and the functions of government suspended pending inquiry into the right to the office. But this rule presupposes the existence of an office *de jure*. There is no principle of law under which a *de facto* court can be sustained: *Norton v. Shelby Co.*, 118 U. S. 425. At the time of the im-

position of this sentence, there was no such court in existence as the criminal court of Arapahoe County, and the jurisdiction of the court to enter this or any other judgment cannot be maintained.

In view of a new trial, attention is called to another error appearing from this record. The offense of which defendants were convicted is alleged to have been committed in the year 1889. At the trial the jury were instructed upon the law of forcible entry and unlawful detainer; the charge upon this subject being based upon sections 1487 and 1488 of the General Statutes of 1883. These sections were expressly repealed by section 28 of an act approved April 10, 1885: Sess. Laws 1885, p. 224.

The last error assigned brings up for review the following part of the charge: "So if you believe and are satisfied, beyond a reasonable doubt, that these defendants, or any one of them, . . . committed, at the time and place mentioned in the testimony, an unlawful act forcibly or violently, or a lawful act in a violent or tumultuous manner, you are warranted in finding a verdict of guilty."

This instruction is objectionable, because it does not require the guilt of the defendants to be established by the evidence beyond a reasonable doubt to justify a conviction. This omission is not cured by any other instruction given in the case, although the jury were instructed at great length, the instructions occupying ten closely printed pages of the abstract. We are not to be understood as holding that it is necessary in every instruction to say to the jury that they must believe from the evidence; but the charge, when considered as a whole, ought to be so clear in this respect that intelligent men will have this principle of law clearly before them when deliberating upon a verdict, particularly in criminal cases. It is doubtful, however, if this judgment should be reversed solely on account of such an omission in the charge. Jurors generally understand that they are to decide all cases solely upon the evidence introduced at the trial. In every case the oath administered to them calls for a determination of the issues upon the evidence, and in the absence of a showing to the contrary, it is to be presumed that they have acted in accordance with this oath: See *Salomon v. Webster*, 4 Col. 353; *Ingols v. Plimpton*, 10 Col. 535.

The judgment is reversed, and the cause remanded. It

will be sent to the district court of Arapahoe County, in accordance with the command of the statute abolishing the criminal court.

OFFICERS DE FACTO—EFFECT OF ACTS OF.—The acts of *de facto* officers, so far as they involve the interests of the public or third persons, are valid; *Magneau v. City of Fremont*, 30 Neb. 843; 27 Am. St. Rep. 436, and note; note to *Hildreth v. McIntire*, 19 Am. Dec. 68, 69.

COURTS—DE FACTO—WHETHER EXIST.—A *de facto* court of appeals cannot exist under a written constitution which ordains one supreme court and defines the duties and qualifications of its judges; *Hildreth v. McIntire*, 1 J. J. Marsh. 206; 19 Am. Dec. 61, and note discussing *de facto* officers.

TRIAL.—What instructions should be given in criminal cases as to reasonable doubt, see notes to *Wagner v. People*, 23 Am. St. Rep. 683, and *Platz v. State*, 16 Am. St. Rep. 410.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

SINDELBARR v. WALKER.

[187 ILLINOIS, 62.]

PARTNERSHIP — RIGHTS OF PARTNERS IN PARTNERSHIP PROPERTY. — A partner's right to partnership property is an interest in all the assets of the firm, subject to the payment of the partnership liabilities.

PARTNERSHIP — INTEREST OF PARTNER IN FIRM PROPERTY, WHEN AND HOW ASCERTAINED. — The individual interest of one partner in the firm property and business can be ascertained only by a settlement of the partnership; and this applies to the interest of a partner in the profits or good-will of the partnership business, as well as to the tangible assets of the firm.

PARTNERSHIP — RIGHT OF PARTNER TO MAINTAIN ACTION FOR INJURY TO FIRM PROPERTY. — Prior to a dissolution of the partnership and a settlement of its affairs, one partner cannot maintain an action to recover his damages for an injury to the firm property, caused by a stranger acting in collusion with his copartner, in wrongfully foreclosing a chattel mortgage upon the partnership property before the maturity of the mortgage debt.

Jones and Lusk, for the plaintiff in error.

Trumbull, Willis, Robbins, and Trumbull, for the defendant in error.

WILKIN, J. Plaintiff in error brought an action on the case against the defendant in error and one Hubka, in the circuit court of Cook County. He afterwards dismissed as to Hubka. The circuit court sustained a general demurrer to his declaration, and rendered judgment against him for costs of suit. The appellate court affirmed that judgment, and he prosecutes this writ of error.

The only question involved in the suit is, Could plaintiff

maintain this action at law on the allegations of his declaration? In substance, these allegations are, that plaintiff and said Hubka were partners in the dry goods business in the city of Chicago, owning a stock of goods and certain store fixtures, on which they had previously executed a chattel mortgage to defendant in error; that long before the maturity thereof, and without any authority of law whatever, defendant in error, by collusion with said Hubka, wrongfully foreclosed said mortgage, and took possession of not only the goods and chattels described therein, but also of others, of the value of five thousand dollars, belonging to said firm, which he afterwards pretended to sell to said Hubka; that by reason of said wrongful seizure and transfer, plaintiff was deprived of said goods and the profits and good-will of said business; that said wrongs were committed in pursuance of a confederation and collusion between said defendant in error and said Hubka, to injure and defraud the plaintiff. There is no averment that the copartnership between plaintiff and Hubka has been dissolved, or any settlement whatever had of their partnership affairs. The declaration, therefore, not only fails to show any individual title or ownership in plaintiff to said property, partnership business, or the profits or good-will thereof, which he says he lost, but affirmatively discloses a state of facts from which it appears that he had only a community of interest therein with his partner, who consented to said transfer, and all that was done by defendant in error.

A partner's right to partnership property is an ownership of all the assets of the firm, subject to the ownership of every other copartner, all of the partners holding all of the firm assets subject to the payment of the partnership debts and liabilities: *Parsons on Partnership*, 350. It is clear, therefore, that the individual interest of one partner in the firm property and business can only be ascertained by a settlement of the partnership: *Bopp v. Fox*, 63 Ill. 540; *Chandler v. Lincoln*, 52 Ill. 77; *Menagh v. Whitwell*, 52 N. Y. 146; 11 Am. Rep. 683. This rule applies to the interest of a partner in the profits or good-will of the partnership business, as well as to the tangible assets of the firm. Until plaintiff's actual interest in the partnership has been determined, there can be no ascertainment of his damages: *Buckmaster v. Gowen*, 81 Ill. 153; *Sweet v. Morrison*, 103 N. Y. 235.

We are clearly of the opinion that, on the facts stated in his declaration, plaintiff has no standing in a court of law.

We find nothing in the authorities cited by his counsel in conflict with this conclusion.

The judgment of the circuit court was right, and was properly affirmed by the appellate court.

Judgment affirmed.

PARTNERSHIP — INTERESTS OF PARTNERS IN FIRM PROPERTY. — Partners have a joint interest in the firm property, and possession of any part of the assets by either partner does not vest a separate interest in him: *Kinsler v. McCants*, 4 Rich. 46; 53 Am. Dec. 711.

WOOTERS v. JOSEPH.

[187 ILLINOIS, 112.]

EXECUTION NOT SIGNED, INSUFFICIENT TO AUTHORIZE REDEMPTION. —

When the only execution recited in a transcript from the docket of a justice of the peace filed in the office of the clerk of the circuit court is a paper, unsigned by the justice, in the form and phraseology of an execution, the transcript, as filed, will create no lien, and will not authorize the circuit court to issue an execution under which redemption can be made from a foreclosure sale.

JUSTICE'S TRANSCRIPT — WHEN CREATES LIEN ON LAND. — In order that a transcript of a justice's docket filed in the circuit court may create a lien on land, and authorize the issuance of an execution by the clerk of that court, it must recite that execution issued under the justice's judgment, and must show a return thereof, to the effect that the defendant has not sufficient personal property within the county to satisfy such judgment and costs.

JUSTICE'S TRANSCRIPT, AS LIEN ON LAND — UPON WHAT DEPENDS. —

Whether or not a lien is created against the land of a defendant by filing a transcript of a justice's judgment and proceedings in the circuit court, and whether or not authority is thus conferred upon the clerk of that court to issue an execution, depends, not upon the existing facts, but upon whether or not such transcript recites the requisite statutory facts.

EXECUTIONS — NECESSARY REQUISITES OF SIGNING. — A paper containing the form and peculiar phraseology of an execution issued by a justice of the peace, but which is not signed by him, is not a valid execution, and confers no authority upon an officer to make a levy. His return upon it can have no more effect than his indorsement upon any other extrajudicial paper.

AMENDMENT OF RECORD AS AFFECTING VESTED RIGHTS. — Rights already vested cannot be affected by an amendment of a record made subsequent to the time of their being vested, nor can such amendment of the record affect one not a party to the proceeding in which the amendment is allowed.

William Winkelman, for the appellant.

Charles Morrison, for the appellees.

SCHOLFIELD, C. J. In the opinion filed when we first rendered judgment in this case, we inadvertently fell into an error in reciting the facts, and in order to make a correction in that respect, and also to give further consideration to the question of law discussed in the argument of the case, we ordered a rehearing.

It is sufficient for a comprehension of the only question of law that we are now called upon to decide to say, in general terms, appellant was the original owner of the property in controversy, and still claims to be its lawful owner. Appellees claim to have obtained appellant's title by a master's deed, executed to them pursuant to a sale under a decree of foreclosure of a mortgage. Appellant claims that one Laughlin redeemed from that sale, and that he himself redeemed from Laughlin, and thereby relieved his title of all encumbrance.

Laughlin's claim of redemption rests upon an execution issued upon a transcript of the docket of a justice of the peace, in which what is claimed to be an execution issued by such justice of the peace is unsigned by any justice of the peace, and the question therefore is, whether a transcript from the docket of a justice of the peace, filed in the office of the clerk of the circuit court, in which the only paper recited in the nature of or resembling an execution is a paper in the form and phraseology of an execution, except that it is unsigned by the justice of the peace, will authorize the circuit clerk to issue an execution, under which a redemption can be made from a prior sale. The right of redemption is statutory (*Little v. People*, 43 Ill. 188), and we must therefore turn to the statute and see whether what was here done was sufficient to authorize a redemption by Laughlin.

It is provided in section 87 of chapter 79 of the Revised Statutes of 1874 (p. 650), that "the personal property of every defendant in a judgment before a justice of a peace, not exempt from execution, shall be bound for the payment of such judgment from the delivery of the execution issued thereon to the constable; and the real property of such defendant, not exempt from execution, shall be bound, as aforesaid, from the date of the filing of a transcript of the judgment in the clerk's office, as provided in this act." Then section 95 of the same act takes up the subject, and proceeds thus: "When it shall appear, by the return of an execution first issued, as aforesaid, that the defendant has not personal property sufficient to satisfy the judgment and costs within the county in

which judgment was rendered, and it is desired by the plaintiff to have the same levied on real property in that or any other county, it shall be lawful for the justice to certify to the clerk of the circuit court of the county in which such judgment was rendered a transcript, which shall be filed by said clerk, and the judgment shall thenceforward have all the effect of a judgment of said court, and execution shall issue thereon out of that court as in other cases." And the next section (sec. 96) directs that "every transcript desired to be used for the purposes aforesaid shall be certified, by the justice of the peace making the same, to be truly copied from the files and books of his office, and shall contain a copy of the original and each subsequent summons or process issued by the justice of the peace, the return of the officer or officers thereon, the judgment and the execution or executions issued thereon, with the return of the officer upon the same, and a copy of his docket in the case." And the next section (sec. 97) requires that the transcript shall be recorded before any execution shall issue thereon.

It is thus seen that the issuing of an execution to the constable, and his return thereon that the defendant has not personal property sufficient to satisfy the judgment and costs within the county in which the judgment was rendered, are conditions precedent to the right to have a transcript filed with the circuit clerk, and that the transcript must recite the execution issued, with the return thereon, and also that it is not merely the existence of the judgment before the justice of the peace, the issuing of an execution thereon and prescribed return thereof by the constable, that creates the lien and authorizes the issuing of the execution by the circuit clerk, but the filing, and recording in the proper office, of the transcript thereof; and so, necessarily, whether in a given case a lien is created and authority conferred upon the circuit clerk to issue an execution must depend, not upon the facts existing, but upon the transcript reciting the requisite facts. A paper containing the form and peculiar phraseology of an execution, except that it is unsigned by a justice of the peace, is not an execution. Such a paper could confer no authority upon a constable to make a levy, and his return upon it could have no other effect than his indorsement upon any other extrajudicial paper.

It is, however, shown, that long subsequent to the execution of the deed to appellees, and since, indeed, the first trial of

that case, appellant obtained leave of the circuit court to amend the transcript of the justice of the peace, by adding the signature of the justice of the peace to the unsigned paper therein, having otherwise the form and phraseology of an execution. But it is a sufficient answer to this, that appellees were not parties to the proceeding in which this leave of the circuit court was obtained, and it is not admissible to affect rights already vested, by an amendment of a record subsequent to the time of their being vested: *McCormick v. Wheeler*, 86 Ill. 114; 85 Am. Dec. 388; *Church v. English*, 81 Ill. 442.

We find no reason justifying us in disturbing the judgment below, and it is therefore affirmed.

EXECUTION — NECESSITY OF SIGNATURE. — An order setting aside a levy upon execution is properly granted on the ground that the execution was not subscribed by the party issuing it, or his attorney, as required by the statute: *Bonesteel v. Orvis*, 23 Wis. 506; 99 Am. Dec. 201. So an unsigned indorsement by a justice, renewing an execution, is void: *Barkyd v. Volk*, 12 Wend. 145; 27 Am. Dec. 124.

SPRINGFIELD HOMESTEAD ASSOCIATION v. ROLL

[137 ILLINOIS, 205.]

FRAUDULENT CONVEYANCES — RIGHTS AS BETWEEN PARTIES. — A conveyance of property in fraud of creditors of the grantor is binding as between the parties to it; and neither courts of law nor of equity will aid a fraudulent grantor in recovering the property, or in enforcing the trust upon which the conveyance was made.

FRAUDULENT CONVEYANCES — EFFECT OF RECONVEYANCE AS BETWEEN THE PARTIES. — While a fraudulent grantee is under no legal but only a moral obligation to reconvey to his grantor, yet when he makes a reconveyance, such act will be binding on him, and if the rights of no innocent third party have intervened, the fraudulent grantor will become reinvested, both in law and in equity, with the title previously conveyed to his grantee.

FRAUDULENT CONVEYANCES — UNRECORDED RECONVEYANCE — EFFECT OF, ON MORTGAGE OF FRAUDULENT GRANTEE. — When a grantor, under a recorded conveyance of his land, made in fraud of creditors, remains in open and notorious possession, and receives a reconveyance from his fraudulent grantee, which, being unrecorded, is afterwards lost or stolen, a subsequent mortgagee of the fraudulent grantee will be deemed to have had notice of the title of the fraudulent grantor arising from his possession under his unrecorded reconveyance, and the mortgage will be considered void as against him, and set aside as a cloud on his title.

ACTION by John E. Roll to establish his title to certain land, and to remove certain clouds from his title. Judgment for the plaintiff. The defendant, Springfield Homestead Association, appealed. The facts appear in the opinion.

Patton and Hamilton, for the appellant.

Palmer and Shutt, for the appellee.

BAILEY, J. It is contended that the conveyances by which the title to the property in question became vested in the complainant's son were made with intent to hinder, delay, and defraud the complainant's creditors, and that the complainant, therefore, is entitled to no relief as against his fraudulent grantee, or as against the Springfield Homestead Association, which claims said property as mortgagee of said grantee. There is evidence tending to sustain the charges of fraud made by the answers, and if the bill had been brought to compel an execution by the alleged fraudulent grantee of the secret trust alleged to have been reposed in him by said conveyances, the contention here made would have been entitled to grave consideration. Where a conveyance of property is made in fraud of the creditors of the grantor, such conveyance is binding as between the parties to it, and neither courts of law or equity will aid the fraudulent grantor in recovering back the property conveyed, or in enforcing the trust upon which the conveyance was made. The courts will leave the parties to the fraudulent transaction precisely where they have placed themselves by their own fraudulent acts, and will give aid or assistance to neither.

But that is not this case. Here, as the complainant contends, his grantee, whether fraudulent or otherwise, has actually and voluntarily made a reconveyance to him of said property, and the scope of the bill is to have the rights to which the complainant has become entitled, by means of such reconveyance, ascertained and declared. While a fraudulent grantee is under no legal obligation to reconvey, he is under a moral obligation to do so, and where, in fulfillment of his moral obligation, he actually makes a reconveyance, such act will be valid and binding on him, and if the rights of no innocent third parties have intervened, the fraudulent grantor will become reinvested, both at law and in equity, with the title previously conveyed to his grantee. Such reconveyance is not within the condemnation of the statute of frauds, but vests in him to whom it is made a title which the courts will

recognize and protect precisely as they would a title derived from any other source.

The bill alleges that, about August 1, 1880, the complainant's son, to whom said property had been conveyed, at the complainant's request, made, executed, acknowledged, and delivered to the complainant a deed of said property; that said deed had not been recorded, and that it had been lost by or stolen from the complainant, and the prayer of the bill is, that a decree be entered establishing the complainant's legal title to said property. The answers of both defendants deny that such deed was executed as alleged, or that any such deed ever existed, and the real controversy in the case arises upon the issue of fact thus presented. By the decree of the court below that issue was determined in favor of the complainant, and the question now is, whether that decree is sustained by the evidence.

The evidence as to whether said deed was executed as alleged is conflicting, and is not perhaps in all respects as clear and satisfactory as could be desired, but after giving it careful consideration, we are not prepared to say that it is not sufficient to warrant the finding of the court below. John E. Roll, the complainant, testifies positively that about the 28th or 30th of July, 1880, Frank P. Roll, his son, executed and delivered to him a deed of said property; that the signature to the deed was in his son's handwriting; that according to his best recollection the deed was acknowledged before Charles Arnold, a notary public, but as to that he is not positive; that his son handed him said deed after it was executed, and that he placed it in a bureau drawer in his room in the house where he lived, and that he saw it many times afterward in that place of deposit; that he first missed it about July or August, 1883; that his son, who was married shortly after the execution of said deed, and also his wife, lived in the same house with the complainant for several years, and had complete access to said room and bureau drawer, and that after said deed was found to be missing, the complainant charged them with having taken it away, but they denied, or at least refused to admit, having done so.

Charles Arnold testifies that he was a notary public in 1880, and that he remembers Frank P. Roll's coming to his office that year to get an acknowledgment taken, and that while he does not remember whether he actually took said acknowledgment, he thinks he did. He admits, however, that he did

not examine the deed nor see its contents, nor what land it related to, and his recollection of the transaction seems to be quite indistinct.

William E. Shutt testifies that, about 1884 or 1885, he purchased, as the result of a somewhat protracted negotiation with John E. Roll, a small lot which formed a part of the property claimed to have been conveyed by Frank P. Roll to John E. Roll by the deed the existence of which is now in controversy, the price agreed upon being \$350; that after agreeing upon the terms of the purchase, he examined the title of said lot as the same appeared of record, and found it to be in Frank P. Roll; that he then went to Frank P. Roll and told him that the title of a piece of property which he had bought of his father was in him, and that as soon as said title was made good, the purchase money was ready; that Frank P. Roll then told the witness that he had nothing to do with said lot; that the property belonged to his father; that he had made to his father a deed for it, which his father said was not on record; that thereupon, at the suggestion of the witness, John E. Roll and Frank P. Roll and wife joined in the conveyance of said lot to the witness, and that the witness paid for it with his check payable to the order of John E. Roll.

The testimony of these witnesses is met by Frank P. Roll with a simple denial. He swears that he never made a deed of the property in question to his father or to any one else; that Charles Arnold never took an acknowledgment of a deed from him to his father; that he sold said lot to Shutt, although he admits that the bargain was made with Shutt by his father; that he received the consideration, although he admits that it was paid by a check, and that he cannot remember who drew the money from the bank or where it went to; and as to the admissions to Shutt in relation to an unrecorded deed to his father, testified to by that witness, he merely says that he does not remember them.

The testimony of Frank P. Roll stands uncorroborated, and besides, the judge of the court below saw the witnesses and had an opportunity of hearing them testify, and therefore had a better opportunity for judging of their relative credibility than we can have. In view of all the facts, we are of the opinion that the said court was justified in holding that the clear preponderance of the evidence was in favor of the complainant, and decreeing accordingly.

The evidence clearly shows that at and before the time of the execution of the mortgage to the Springfield Homestead Association, the complainant was in visible and notorious possession of that part of the property in question in respect to which the decree is in favor of the complainant. Such possession charged said association with notice of the complainant's title, and the court therefore properly held that, as to that property, the mortgage was void as against the complainant.

The decree, being supported by the evidence, will be affirmed.

FRAUDULENT CONVEYANCES are valid between the parties and their representatives: *Gilbert v. Stockman*, 81 Wis. 602; 29 Am. St. Rep. 922, and cases cited in the note.

POSSESSION OF REALTY IS NOTICE OF TITLE: *Lance v. Gorman*, 136 Pa. St. 200; 20 Am. St. Rep. 914; *Johnston v. Glancey*, 4 Blackf. 94; 28 Am. Dec. 45; but such possession must be notorious and exclusive: *Boyce v. McCulloch*, 3 Watts & S. 429; 39 Am. Dec. 35. Compare *Hardy v. Summers*, 10 Gill & J. 316; 32 Am. Dec. 167; *Baynard v. Norris*, 5 Gill, 468; 46 Am. Dec. 647; *Dutton v. Warschauer*, 21 Cal. 609; 82 Am. Dec. 765 (cases of vendor and purchaser). On the other hand, where the grantor, prior to his discovery of the fraud by which a conveyance of the land had been induced, continued in possession of the land under an agreement with the grantees, it was held that such possession was not constructive notice of his equity arising out of the fraud against one claiming under a mortgage from the grantees: *Matesky v. Feldman*, 76 Wis. 103.

McNULTA v. LOCKRIDGE.

[187 ILLINOIS, 270.]

RECEIVER OF RAILWAY — LIABILITY OF IN HIS OFFICIAL CAPACITY. — A receiver of a railroad company, who is exercising the franchises of such company and operating its road, is, in his official capacity, amenable to the rules of liability applicable to the company when it is operating the road by virtue of the same franchises. For torts committed by his servants while operating the railroad under his management, he is responsible in such capacity upon the principle of *respondet superior*.

RECEIVER OF RAILWAY — LIABILITY FOR TORTS OF SERVANTS. — The liability of a railroad receiver for the torts of his servants in operating the road is a liability in his official capacity only. The damages for such torts cannot be recovered in suits against him personally, but may be recovered in suits in which he is named or designated as receiver, and paid out of the fund or property which the court appointing him has placed in his possession and under his control.

RECEIVER OF RAILWAY — TORTS OF SERVANTS OF — LIABILITY OF RAILWAY COMPANY FOR. — A railway company, having no control over the

receiver of its property or his servants, is not, in the absence of an absolute liability imposed by statute, responsible for the negligence or torts of the employees of the receiver in operating the road.

RECEIVER OF RAILWAY — ACTION AGAINST — JUDGMENT IN REM. — A judgment against a receiver of a railroad company, as receiver, for a liability incurred by his predecessor in office, is not a personal judgment against the receiver, but is in the nature of a judgment *in rem* against the matters of the receivership or the fund and property which are the subjects of the trust.

RECEIVER OF RAILWAY — LIABILITY FOR ACTS OF PREDECESSOR. — When liability of a railway receiver is incurred for the torts of his servants in operating the road, and after his resignation is accepted his successor is appointed by the federal court of chancery which appointed him, an action at law by the aggrieved party will lie in the state court against such successor in his representative capacity.

RECEIVER OF RAILWAY APPOINTED BY A FEDERAL COURT — ACTION AGAINST, WHERE WILL LIE. — An action at law can be maintained in a state court against a receiver of a railway appointed by a federal chancery court, for the torts of the servants of his predecessor in the same receivership.

REMEDIAL STATUTE — HOW CONSTRUED. — In construing a remedial statute, its language, so far as is consistent with a fair construction of the law, should be so interpreted as to promote and advance the remedy.

PLEA OF GENERAL ISSUE DOES NOT PUT IN ISSUE either the character in which plaintiff sues or the character or capacity in which the defendant is sued.

PLEADINGS — ADMISSION BY PLEA OF NOT GUILTY. — When, in an action against the receiver of a railway to recover for personal injury caused by the negligence of the servants of his predecessor in the same receivership, the declaration alleges that at the time of the accident such predecessor was receiver of such railway by appointment of a certain court, and as such was in possession of and operating the road; that the operators on the trains were the servants of such predecessor as receiver; that on a certain day such predecessor resigned his office as such receiver, and on the same day said court accepted the resignation and appointed the defendant as receiver to succeed his predecessor; that the defendant qualified and entered upon his duties as such receiver and successor, — a plea of not guilty admits not only the representative character of the defendant when sued, but also the allegations of the declaration as to his predecessor and his own appointment as receiver.

INSTRUCTIONS — MEANING OF WORDS "AT THE TIME." — In an action to recover for the death of a person killed while attempting to cross a railroad track, an instruction submitting to the jury the question of his due care "at the time" of the accident is not erroneous as limiting the inquiry to the precise moment of collision. The words "at the time" as used in the instruction refer to the whole transaction, including due care in looking and listening before attempting to cross the track, when evidence on this point is before the jury.

INSTRUCTIONS — INACCURACY IN, WHEN WILL NOT REVERSE. — Though instructions given are faulty and inaccurate, the judgment will not be reversed when the record demonstrates that they were properly understood by the jury, and that it was not misled, nor the parties injuriously affected thereby.

ACTION to recover for death caused by negligence. On January 15, 1887, James Molohan and his wife, while attempting to cross the track of the Wabash, St. Louis, and Pacific Railway Company, in a sleigh, at a public crossing were struck by an engine belonging to said company, and killed. On July 13, 1887, Lockridge, the defendant in error as administrator of such deceased persons, brought an action against the plaintiff in error as receiver of said railway company for causing their deaths. The declaration alleged negligence in failing to give proper signals when approaching the crossing; in allowing a growth of trees and shrubbery to remain on the right of way about the crossing, which prevented the persons killed from seeing the engine in time to avoid being struck by it; and also in allowing the engine to be driven at a high and reckless rate of speed. The declaration also alleged "that on the sixteenth day of December, 1886, in a certain cause in equity then pending in the circuit court of the United States for the southern district of Illinois, wherein the Central Trust Company of New York, and others, were complainants, and the Wabash, St. Louis, and Pacific Railway Company, and others, were defendants, one Thomas M. Cooley was, by the order of said court, appointed receiver of the Wabash, St. Louis, and Pacific Railway Company, and was then and there duly qualified as such receiver, and from thenceforward, until the first day of April, A. D. 1887, had possession of, used, and operated said railway," etc. And such declaration concluded as follows: "And the plaintiff further avers that said Thomas M. Cooley afterwards, to wit, on the first day of April, A. D. 1887, resigned his said office of receiver, as aforesaid, and the said circuit court of the United States for the southern district of Illinois accepted the resignation of said Thomas M. Cooley as such receiver, and afterwards, to wit, on the first day of April, A. D. 1887, the court last aforesaid, by an order entered in the said cause aforesaid, appointed the defendant, John McNulta, receiver of said Wabash, St. Louis, and Pacific Railway Company; that said defendant, John McNulta, then and there duly qualified as such receiver, and he thenceforward has been in possession of, using, and operating said railway as such receiver." Defendant interposed a plea of not guilty. At the close of plaintiff's testimony, defendant moved the court to instruct the jury that upon the evidence plaintiff was not entitled to recover. The court refused to grant the motion, and defend-

ant duly excepted. The following instructions were given at the request of the plaintiff: "1. The court instructs the jury, that if they believe from the evidence that the plaintiff's intestates, while exercising ordinary care to avoid injury, were killed by the negligence of the defendant, as charged in the declaration, they will find for the plaintiff." "3. The court further instructs you, that if you believe from the evidence that the agents or servants of the defendant in charge of the engine in question failed to ring a bell or sound a whistle continuously, for a distance of eighty rods before reaching the crossing, and that James Molohan and Mary E. Molohan, while attempting to pass over the railroad track at said crossing, were exercising due care and caution for their own safety, and were struck and killed at said crossing by an engine then in charge of such agents or servants, and that such killing was the direct result of the failure of said agents or servants to ring a bell or sound a whistle, then the jury should find for the plaintiff." "4. The court instructs the jury, that evidence of the general habit of James Molohan when crossing railroad crossings may be taken into consideration by the jury, together with all the facts and circumstances in evidence, in determining the degree of care used by the deceased while attempting to cross the defendant's railroad at the time they were killed, and that it is not necessary that the plaintiff should show, by an eye-witness, as to said Molohans' care and caution exercised by them at the crossing at the time they were killed, in order for the plaintiff in this case to recover, provided you believe from the evidence, and all the facts and circumstances in evidence, that they were exercising ordinary care and caution for their own safety at the time they attempted to cross the said railroad track." The court refused to give the following instruction, upon the request of the defendant: "4. The court instructs the jury, that it is averred in plaintiff's declaration that at the time of the accident in question Thomas M. Cooley was operating the railway as a receiver, and that the defendant was subsequently appointed the successor of said Cooley as such receiver; and the court instructs you, that to entitle the plaintiff to recover, this averment must be proved, and unless the plaintiff has made such proof, the jury should find for the defendant, without regard to all other questions in the case." Verdict and judgment for the plaintiff for six thousand dollars, and defendant appealed.

George B. Burnett, for the plaintiff in error.

Patton and Hamilton, and Ricks and Creighton, for the defendant in error.

BAKER, J. The two principal questions for determination are: 1. Can an action at law be maintained against a receiver for the tort of the servants of his predecessor in the same receivership? and 2. If such action can be maintained, did the general issue put the plaintiff upon proof of the averments of his declarations, that at the time of the injuries complained of Cooley was operating the railway as receiver, and that the defendant was subsequently appointed his successor in the receivership. In addition to these, several questions of minor importance arise upon the rulings of the trial court on the instructions.

1. A receiver of a railroad company, who is exercising the franchises of such company and operating its road, is, in his official capacity, amenable to the same rules of liability that are applicable to the company when it is operating the road by virtue of the same franchises. For torts committed by his servants while operating the railroad under his management, he is responsible upon the principle of *respondet superior*. The liability, however, is not a personal liability, but a liability in his official capacity only; and the damages for such torts are not to be recovered in suits against him personally, and collected on executions against his individual property, but recovered in suits or proceedings in which he is named or designated as receiver, and to be paid only out of the fund or property which the court appointing him has placed in his possession and under his control. The corporation itself, having no control over either the receiver or his servants, is not, in the absence of an absolute liability imposed upon the company by statute, responsible for the negligence or torts of the employees of the receiver, and no suit against it for damages occasioned thereby can be maintained. These rules of law are well settled, and have been held in many adjudicated cases, and are laid down in the text-books.

In the case at bar the judgment was not against McNulta personally, but against him in his official capacity of receiver, and no execution was awarded against him, either personally or otherwise. The judgment was, that the plaintiff "have and recover of and from said defendant, John McNulta, receiver of the Wabash, St. Louis, and Pacific Railway Com-

pany, the said sum of six thousand dollars, as his damages aforesaid, to be paid in due course of administration of the trust, together with his costs and charges herein expended."

It seems to us that the expression found in the judgment, "to be paid in due course of administration of the trust," affords the key for the solution of the question whether or not an action at law can be maintained against a receiver for the tort of the servants of his predecessor in office. The judgment, in substance and in fact, is not a judgment against John McNulta, but a judgment against John McNulta, receiver, etc., and to be paid out of the funds and property in his hands as such receiver,—in other words, a judgment against the matter of the receivership, which the court of chancery authoritatively organized in a certain cause in equity pending therein, wherein the Central Trust Company of New York, and others, were complainants, and the Wabash, St. Louis, and Pacific Railway Company, and others, were defendants. The judgment is, as it were, in the nature of a judgment *in rem*, and the *res*—the thing against which it has validity and force—is the matter of the receivership, the administration in the chancery court of the trust, and the fund and property which are the subjects of the trust. The receiver is sued as such, and merely because he is, for the time being, the tangible representative of the matter of the receivership. Although Cooley may have been at one time receiver, and may have resigned, and McNulta may have been appointed his successor in office, yet all the while the identity of the *res*—the matter of the receivership constituted by the court in the chancery suit brought by the Central Trust Company and others—was preserved. The liability for the torts and negligences charged in the declarations was upon the administration undertaken by the chancery court, and was, through such court, enforceable against the fund and property which were the subjects of the trust being administered, and followed such fund and property into whose-soever's hands they came as receiver.

The torts which are complained of in the declarations were not the personal negligence of Cooley, but the negligences of his servants in his capacity of receiver,—in other words, the negligences of the receiver; and when McNulta succeeded him in the same receivership, they continued to be negligences of the receiver, and negligences for which such receivership was liable, and, by relation, negligences of McNulta, receiver, since

he, and he only, was the legal representative of the receivership. The ground of the liability of plaintiff in error, as receiver, grows out of the relation of Cooley, the former receiver, to the railroad which he operated, and the continuation and identity of that relation in plaintiff in error, as his successor in the same receivership.

In *Davis v. Duncan*, 19 Fed. Rep. 477, the court said: "The proceedings against a receiver, as receiver, for the wrongs of his employees is in the nature of a proceeding *in rem*, and renders the property in his hands as such liable for compensation for such injuries." In *Farmers' Loan etc. Co. v. Central R. R. Co. of Iowa*, 7 Fed. Rep. 539, the court said: "It is therefore obvious that suits against receivers are really and substantially suits against the fund or property of which they are custodians. They represent the property or fund. If judgment be obtained against them, the court orders it to be satisfied out of the fund or property."

The defendant in error alleges negligence on the part of the employees of Cooley, receiver, whereby his intestates were killed, and he claims that he is lawfully entitled to recover damages therefor. No suit lies against the company whose railroad was being operated by Cooley: High on Receivers, sec. 396; 2 Rorer on Railroads, 896. No suit can be maintained against Cooley personally, or as an individual: High on Receivers, sec. 395; 2 Rorer on Railroads, 298. Cooley having been discharged from the receivership, no suit can be prosecuted against him, in an official or representative capacity, for torts committed by his employees while he was receiver: 2 Rorer on Railroads, 899; High on Receivers, 2d ed., sec. 398 b, and authorities there cited.

In *New York and Western Union Tel. Co. v. Jewett*, 115 N. Y. 166, the court says: "Obviously, after the receiver has been discharged, and the property, by the action of the court, has all been taken out of his hands, there can be no propriety whatever in any further proceedings against him, because thereafter he ceases to represent any one. He can no longer act for or represent the company or its creditors, or any other person interested in the property; and manifestly the court could not thereafter make an order that he should pay a creditor, he no longer having any funds out of which payment could be made: *Farmers' Loan etc. Co. v. Central R. R. Co. of Iowa*, 2 McCrary, 181. It would be a very singular proceeding to permit a creditor to litigate his claim with a person who

was formerly a receiver, but who has ceased to be such, and who is no longer the officer or agent of the court, or subject to its control."

There being, then, no right of action either against the railroad company or personally against Cooley, the late receiver, or against Cooley in any representative capacity, is defendant in error without remedy at law, for the enforcement of his purely legal rights of action?

Section 2 of the act of Congress of March 3, 1887, provides as follows: "That whenever, in any cause pending in any court of the United States, there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner the owner or possessor thereof would be bound to do if in possession thereof." And section 3 of the act reads thus: "That every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

It is unnecessary to state in detail the defects and mischiefs in the administration of the law which this act of Congress was intended to remedy. Suffice it to say, that it is the evident intention of the statute that a plaintiff who has a strictly legal right of action, and a claim for unliquidated damages enforceable against and payable out of property which is in the possession and under the control of a receiver appointed by a federal court, shall not be deprived of his action at law, and of the right of trial by jury. In construing a remedial statute, its language, so far as is consistent with a fair construction of the law, should be so interpreted as to promote and advance the remedy. It was the legislative intention that the suits provided for in the act should be maintainable in respect to all acts or transactions of receivers in carrying on the business connected with the property in their possession and control. It is improbable that it was the intention that defendant in error should have the benefits conferred by the act provided Cooley continued to be receiver,

but should be deprived of such benefits in the event Cooley resigned and was succeeded in the office of receiver by McNulta. It is unreasonable to suppose that it was the intention of Congress that actions at law should not be maintained for torts committed by the employees of a receiver unless such actions were brought and prosecuted to judgment while such particular receiver remained in office, for in that event the right to prosecute suits at law, and the right to trial by jury, which are the rights which the statute intended to preserve and protect, could at any and at all times be cut off and destroyed by the resignation or discharge of the particular receiver during whose administration of the receivership the torts were committed or injuries received. If it is not manifestly in conflict with the language of the act, it should receive such an interpretation as will be commensurate to the mischiefs which were intended to be remedied by it. The word "every," and the clause "may be sued in respect of any act or transaction of his," found in section 3, should not receive the narrow and restricted construction contended for by plaintiff in error. The word "his" refers to the officer who is the receiver or manager of the property which is the subject of the trust organized by the court, and is not to be restricted to some one individual who, at a particular time during the existence of the receivership, filled that office.

Our conclusion then is, that an action at law can be maintained against one receiver for the torts of the servants of his predecessor in the same receivership.

2. It is conceded by plaintiff in error, that when the general issue alone is pleaded it does not put in issue either the character in which the plaintiff sues, or the character or capacity in which the defendant is sued. It is claimed, however, that in the case at bar the general issue admitted that McNulta was receiver at the time he was sued, and that only. We think this is placing too restricted a signification upon the implied concessions made by the pleadings. Suppose that a declaration alleged that A, since deceased, made his last will and testament, by which he appointed B his executor, and that B qualified and acted as such executor; that B afterwards resigned his office of executor, and was discharged, and that C was thereupon appointed administrator *de bonis non, cum testamento annexo*, and duly qualified as such administrator, and became and was the successor in office to B; and further suppose the suit was brought against C, as such ad-

ministrator, and for the purpose of enforcing a legal liability assumed by or imposed upon B in his capacity of executor, and the declaration alleged, in apt language, the facts above stated, and also the particular cause of action sought to be enforced. In such state of the case, the general issue and no other plea being filed, there would be an implied admission, not only that C was administrator at the time of suit brought, but also implied admissions that B was executor at the time when, etc., and that C was successor in office to B, as averred in the declaration.

Again, suppose suit was brought against the Illinois Central Railroad Company, and the declaration averred that at the time when, etc., said company was operating the Illinois Central Railroad from Chicago to Cairo, at, etc., on, etc., aforesaid, the plaintiff was a passenger on said railroad, and that by means of certain specified negligences on the part of the servants of the railroad company operating the train upon which he was a passenger, he, the plaintiff, received certain personal injuries. The plea of not guilty, and that only, being interposed, it could not properly be claimed that the suit of the plaintiff must fail, and for the reason that he did not introduce at the trial a witness who could testify, from his personal knowledge, that at the time when, etc., the corporation sued was operating the railroad, and that the conductor, engineer, fireman, and others operating the train, had been employed by the company sued, and were in fact its servants, and not the servants of some receiver or other person or corporation. In the case last stated it would be impliedly conceded by the pleadings, not only that the Illinois Central Railroad Company was a corporation, but also that at the time of the alleged injury it was operating the particular line of railroad mentioned in the declaration, and that the operatives in charge of the train being run on said road were its servants and employees.

The two supposed cases above stated, taken together, present, in substance, the case that appears in the record now before us. The admission upon the pleadings is of the character and capacity in which the defendant is sued. That character and capacity includes not only the bare fact that at the time that suit was instituted plaintiff in error was receiver, but the further facts alleged in the declarations, that at the time when, etc., Cooley was receiver of the Wabash, St. Louis, and Pacific Railway Company, by appointment of

court made in the cause in equity designated in the declarations, and was in possession of and operating the line of railway mentioned therein, as such receiver, and that the employees operating the trains on said road were the servants of said Cooley, as such receiver, and that on April 1, 1887, said Cooley resigned his office of receiver, and the court accepted such resignation, and on the same day, and in the same cause, appointed McNulta as such receiver, and as successor in office to Cooley, and that he, McNulta, then and there qualified, and entered upon his duties as such receiver. In line with what we have thus stated on this point is the case of *McNulta v. Ensch*, 134 Ill. 46.

The views we have expressed sufficiently indicate our opinion that the trial court committed no error in refusing to instruct the jury as requested by plaintiff in error.

3. It is objected that the first and third instructions given at the instance of defendant in error virtually told the jury that there was evidence before them from which they might find the injuries were inflicted by McNulta, receiver, whereas there was no evidence whatever that McNulta or his servants inflicted the injuries. The expressions in said instructions, "were killed by the negligence of the defendant, as charged in the declaration," and "the agents or servants of the defendant in charge of the engine in question," are not strictly accurate. We have no doubt but that the court understood that the "defendant" referred to in said instructions was the receiver in possession of and operating the road when the intestates were killed, and whose successor in office McNulta was. The jury manifestly so understood them, for otherwise they could not, under the instructions of the court, have returned a verdict for defendant in error. It is also perfectly plain that the plaintiff in error and his attorneys so understood and used the expression "the defendant," for in the first instruction given at his and their instance is found the phrase, "no other acts of negligence on the part of the defendant"; in his and their fourth instruction occur the words, "that the defendant was guilty of negligence," and the further words, "that the defendant was guilty of the negligence complained of"; and in his and their twelfth instruction the expression, "that the defendant is guilty of each and all of the acts of negligence charged in the plaintiff's declaration." It would be subversive of justice, even if the instructions are not liter-

ally accurate, to reverse a judgment for an inaccuracy which, the record demonstrates, neither misled the jury, nor misled or injuriously affected any one else.

4. It is urged that instruction No. 4, for defendant in error, was erroneous. The claim is, that it limited the inquiry of the jury as to the exercise of ordinary care by the deceased to the moment of time when they were killed, and to the immediate time they were in the act of crossing the railroad track. The general habit of James Molohan of looking and listening, and of care and caution when approaching or attempting to cross railroad tracks, was in evidence. The instruction called the attention of the jury to this "general habit" of Molohan, and in connection therewith used the expressions, "at the time they were killed," and "at the time they attempted to cross the railroad track." The jury could not reasonably have understood the instruction otherwise than as referring to the occasion on which the intestates attempted to cross the track and were killed. As was said by this court in *Lake Shore etc. R'y Co. v. Johnsen*, 135 Ill. 641: "The words 'at the time,' as used in the instruction, refer to the whole transaction."

In *Chicago etc. R'y Co. v. Halsey*, 133 Ill. 248, cited by plaintiff in error, the instruction involved was quite different from that here in question, and was based upon a wholly different state of facts, and the objection to it was, that by it certain facts and circumstances in evidence, and bearing upon the matter of the conduct of the deceased as he approached the crossing, were ignored, and the attention of the jury restricted to the fact and the effect of the absence of direct evidence of what said deceased did at the immediate time of the injury. Here there was no such restriction, but reference was made to a habit, which necessarily called the attention of the jury to the conduct of the intestates preceding the immediate time of the injury. The matter of the care required in approaching the crossing was very fully covered and explained by very numerous instructions given at the instance of plaintiff in error. Besides this, it appears from the special findings of fact made by the jury, that they affirmatively found, from the evidence, that the deceased, as they approached the track, and before driving upon it, looked and listened for the approach of an engine or train. This renders it absolutely certain that the jury were not misled by the instruction.

We find no error in the record for which the judgment should be reversed. The judgment of the appellate court is affirmed.

RECEIVERS OF RAILROAD COMPANIES, LIABILITY OF.—That a receiver is liable in his official capacity for injuries resulting from the negligent operation of the road, in all cases in which the company itself would be liable if it were carrying on the business in its own name, see extended note to *Nagles v. Alexandria etc. R. R. Co.*, 5 Am. St. Rep. 315, 316. A receiver empowered to take possession of, control, and operate a railway is, in some sense, the representative of the corporation that owns it: *Howe v. Harding*, 76 Tex. 17; 18 Am. St. Rep. 17. Under the Texas statute making the "proprietor, owner, charterer, or hirer" of a railroad liable for injuries caused by negligence, a receiver is held not liable for injuries resulting in death: *Yokum v. Selph*, 84 Tex. 607; *Turner v. Cross*, 83 Tex. 218. But where no personal judgment is asked against a receiver, it is unimportant whether the defect causing the injury existed when the railroad came into his hands, or whether he had been in charge a sufficient time to repair the defect: *Bonner v. Mayfield*, 82 Tex. 234; *Clark v. Dyer*, 81 Tex. 339; *Texas etc. R'y Co. v. Geiger*, 79 Tex. 13.

RECEIVERS. — LIABILITY OF RAILROAD COMPANY for injuries inflicted while the road was in the hands of receivers is discussed in the note to *Texas Pacific R'y Co. v. Johnson*, 18 Am. St. Rep. 75-78. Later cases adopting the same rule as this case are *Texas etc. R'y Co. v. Brick*, 83 Tex. 526; 29 Am. St. Rep. 675; *Boggs v. Brown*, 82 Tex. 41; *Texas etc. R'y Co. v. Bailey*, 83 Tex. 19; *Texas etc. R'y Co. v. Huffman*, 83 Tex. 286; *Texas etc. R'y Co. v. Comstock*, 83 Tex. 537. The broad principle is, that the railroad company is liable for any claim which should have been paid by the receiver out of the earnings of the road.

RECEIVER. — TERMINATION OF LIABILITY BY DISCHARGE.—See cases cited in note to *Texas Pacific R'y Co. v. Johnson*, 18 Am. St. Rep. 77. After the discharge of a receiver and surrender by him of the assets, no judgment can be rendered against him to bind the property, although in his possession when the suit was begun. Nevertheless the discharge does not abate the suit, which may be prosecuted against his successor: *Bond v. State*, 63 Miss. 648.

RECEIVERS APPOINTED BY FEDERAL COURTS, ACTIONS AGAINST.—A state court has jurisdiction of a suit against a receiver appointed and acting on an order made by the United States court: *Southern Pac. R'y Co. v. Maddox*, 75 Tex. 300. But in an action against such receiver for damages, it is error for the district court to prescribe the particular funds out of which the judgment should be paid. The judgment should be against the receiver in his official capacity, leaving the matter of its enforcement to be determined by the court having jurisdiction of the receivership, in view of the rights of all persons interested in the proper application of the fund in the custody of the court: *Brown v. Brown*, 71 Tex. 355. For a case in which it was held that an action for trespass could not be maintained in a state court against a receiver appointed *pendente lite*, by a federal court, merely for the purpose of foreclosing mortgages on the corporate property of a railway company, see *Decker v. Gardner*, 124 N. Y. 334.

REMEDIAL STATUTES SHOULD BE CONSTRUED LIBERALLY: *Orndoff v. Turman*, 2 Leigh, 200; 21 Am. Dec. 608; *White v. The Mary Ann*, 6 Cal. 462;

65 Am. Dec. 523; *Union Pac. R'y Co. v. De Busk*, 12 Col. 294; 13 Am. St. Rep. 221.

PLEA OF GENERAL ISSUE IS A WAIVER of all objections to the person of the plaintiff, and admits his capacity to sue in the action: *Brown v. Illinois*, 27 Conn. 84; 71 Am. Dec. 49; *McIntire v. Preston*, 5 Gilm. 48; 48 Am. Dec. 321.

INSTRUCTIONS CONTAINING THE WORDS "AT THE TIME."—That these words constitute part of the instructions ordinarily given in regard to contributory negligence, see *Gavett v. Manchester etc. R. R. Co.*, 16 Gray, 501; 77 Am. Dec. 422, and cases given in the note thereto.

APPEAL.—Judgment will not be reversed if the instructions, though faulty, cannot have done any injury to the party complaining, or misled the jury: *Hemmingway v. Chicago etc. R'y Co.*, 72 Wis. 42; 7 Am. St. Rep. 823; *Hill v. Finigan*, 77 Cal. 267; 11 Am. St. Rep. 279; *Bancroft v. Otis*, 91 Ala. 279; 24 Am. St. Rep. 904.

CLOKE v. SHAFROTH. CLOKE v. DOWSE.

[187 ILLINOIS, 303.]

WAREHOUSEMAN—WHEN PURCHASER, AND LIABLE FOR GOODS IN STORE.

—When corn is delivered to a warehouseman for storage, under an agreement that he may sell all or any part of it, and either return the corn on demand or pay for it at the market price when its return is demanded, and he sells so much of the corn in his warehouse that there is not enough remaining to replace all the corn so delivered to him at the time his warehouse and its contents are destroyed by fire, he is liable for the value of all corn so stored with him, because the transaction amounts to a sale, and not a bailment, although he has made advances on the grain so stored.

SALE OF PART OF MASS—WHEN COMPLETE.—When the subject of sale or exchange is part of a mass of the same kind, quality, and grade, as of part of the corn or wheat in an elevator, separation from the mass, or other specification of the particular part sold, is unnecessary to its appropriation, independent of the statute vesting the ownership in the holder of a warehouse receipt.

WAREHOUSEMAN—POWER TO EXCHANGE GRAIN IN STORE—LIABILITY FOR LOSS.—A warehouseman as bailee of the grain of others, in store in his warehouse, has no power to transfer it or any part of it to another in exchange for the grain of the latter which such warehouseman has sold as his own. In case of the destruction of his warehouse and its contents by fire, he will be liable for the value of the grain thus sold by him.

C. H. Payson, for the appellants.

Cook and Moffett, for the appellees.

SHOPE, J. These two cases may, to save repetition of statement, be considered in one opinion. Both were *assumpsit*, in the Ford circuit court. In the first, the Shafroth case, the

declaration contained the common money counts, and also that the defendants bargained for and bought of the plaintiff three thousand bushels of corn, at twenty-eight cents per bushel, to be delivered, etc., within a reasonable time, and a failure to deliver after reasonable demand, etc.; and also that plaintiff, at the request of complainant, delivered to defendants twelve hundred bushels of corn, and in consideration thereof the defendants promised plaintiff to return to him a like quantity and quality of corn as that delivered, upon demand, etc. The general issue was filed, and trial had by the court, resulting in a finding and judgment for plaintiff. In the Dowse case the declaration contained the common counts for goods sold, for money had and received, and a count for corn sold, to be delivered within a reasonable time, to be paid for on delivery, and although delivered defendants refused to pay, etc. General issue was filed, jury waived, and trial by the court, resulting in a finding and judgment for plaintiff. Propositions were submitted in each case, properly raising the questions determined. On appeal these judgments were severally affirmed by the appellate court, and defendants below prosecute appeals.

Appellants were warehousemen and dealers in grain at Kemper, Illinois. Their warehouse was in the class designated "Class B," which, with its contents, was destroyed by fire October 1, 1889, without their fault. There is some conflict in the evidence as to the amount of corn in store at the time of the fire, the amount testified to varying from fifteen hundred to three thousand two hundred bushels of shelled corn in the warehouse, besides about fifteen hundred bushels of corn in the ear, in cribs, also destroyed. There had been delivered into the warehouse for storage, by various parties, — counting the Shafroth corn as so delivered, — fifteen hundred bushels of shelled corn, for which, at the time of the fire, the liability to account was outstanding. The following rules were introduced in evidence, and it was admitted they had been posted in appellants' office at the warehouse over a year, and were matter "of public observance": —

"In the absence of other agreements, grain left in this elevator will be settled for at the market price for said grain on the day of delivery. Grain left for storage will be subject to the following: All grain in good condition may be stored thirty days free of charge, and thereafter for one cent per bushel for fractional thirty days from five to fifteen; over that number

of days, and under thirty, one cent, — all subject to owners' risk.

"When stored grain is sold to other parties, or taken out of storage, storage charges will begin on day of receipt, and one cent in addition thereto will be charged for handling same. Grass seed and millet will only be received for storage on special agreement. We reserve the right to inspect all grain presented for storage, and to place therewith other grain of same grade and quality."

It was also shown by appellants, by a number of witnesses, that it was customary and usual for grain dealers running and operating warehouses of the kind in question, and of the class in question, to ship out of their warehouses, indiscriminately, grain belonging to themselves or grain left with them in store; that the state of the market at the time of the shipment determined the question as to whether or not it was advisable to sell corn or grain in the house in store; that if the state of the market was such that the warehouseman believed it would be advantageous to use the corn left in store as his own, and ship it and use the proceeds of the shipment, it was customary to so use it, expecting to settle with the parties who stored the corn at whatever the market price might be when a settlement was demanded by the storer.

It appears in the Shafroth case, that on the twenty-sixth day of September, — four days before the fire, — a son of appellee made inquiries of appellants in respect of storing the corn of his father, and was told they would store it. Appellee's corn was shelled, and 1,010 bushels delivered on Saturday, the 28th of September. When he began hauling, it appears that the engine was out of order, so that the corn could not be elevated, and the agent of appellee, who delivered the corn, was told by appellants that he would have to shovel it into cars standing on the Illinois Central railroad tracks, to which he consented, and all of appellee's corn was delivered aboard said cars. One of appellants testifies that he told the agent that they (appellants) would keep corn in the warehouse to replace the corn loaded into the cars for appellee. Before the fire appellee's corn was shipped by appellants to Chicago, and sold, they receiving the proceeds. No warehouse receipt was given for appellee's corn, or for a like amount in the warehouse.

It is insisted that appellants are not liable to appellee Shafroth, for the reason that, in effect, his corn was stored in

their warehouse; that by the arrangement a like quantity of the same quality and grade of corn therein as that shipped became the property of appellee; that they were bailees only, and the destruction of the corn having occurred without fault on their part, the loss must fall upon appellee, — or, at most, if there was not enough corn in the warehouse to meet the liability of appellants to all who had grain therein, they would be liable to appellee for a *pro rata* share of the deficiency only. In this we do not concur. It is an elementary principle, of general application alike to sales and exchanges with property, that the contract is executed only by the appropriation of the specific goods or chattels to the contract. Until this is done the contract remains executory, and no title passes. It is, however, held, by what is probably the weight of modern American decisions, that where the sale or exchange is part of a mass of the same kind, quality, and grade, as of part of the corn or wheat in an elevator, separation from the mass, or other specification of the particular part sold, is unnecessary to its appropriation, independent of the statute vesting the ownership in the holder of a warehouse receipt: 1 Benjamin on Sales, secs. 469 et seq., and cases cited.

But if this doctrine should be held and applied to this case, it could not avail appellants. It is manifest that appellants had no corn in their warehouse, the ownership of which could have passed to appellee. The effect of the arrangement, if made as they contend, was, that they would keep in store for appellee 1,010 bushels of corn of like grade and quality as that delivered by him. At no time before the fire, after the delivery of appellee's corn, had they that amount, or any amount, of corn in their warehouse that could be appropriated to appellee. As we have seen, there was, at most, three thousand two hundred bushels in store, and that unquestionably belonged, if appellants' statements be true, to persons who had stored corn in their warehouse to the amount of four thousand one hundred bushels. To have added Shafroth's corn would have created a shortage of practically two thousand bushels, accepting their own version of the amount in store. On the other hand, if the evidence of appellee's witnesses is to be taken, there was only about fifteen hundred bushels in store, making a shortage of about two thousand six hundred bushels, or if Shafroth's be added, of three thousand six hundred bushels. The corn was the property of the persons who had stored it, and it was not in the power of appellants, who were

mere bailees thereof, to transfer it, or any part of it, to appellee. Undoubtedly, as explained by appellants to have been their custom, they relied upon buying in other corn to be kept in store for appellee, but before they did so the fire came. We are of opinion that they were clearly liable upon the count for money had and received, and that the judgment of the appellate court affirming the judgment in favor of appellee, Shafroth, must be affirmed.

In the other case, of the same appellants against Dowse, the facts peculiar to that case are, that on September 7, 1889, appellee delivered to appellants 2,232 bushels of shelled corn, which was elevated into their warehouse. On the day of its delivery, appellants advanced to appellee thirty dollars, and a few days later accepted an order for fifty dollars, and subsequently gave him twenty dollars, making one hundred dollars in all. No warehouse receipt was given. The parties disagree in respect of what was said at the time of the delivery of the corn, and as to whether the money before mentioned was a payment upon the corn, or simply an advance to appellee. It appears that appellee was desirous of hauling his corn to the elevator, but was unwilling to take the price at which it was then selling. Appellants had room in their warehouse, and consented to his putting it there, saying to him he could keep it there for thirty days without charge. It seems nothing was said about selling the corn at that time. As before seen, there was, at the time of the fire, a shortage in the amount of corn in the elevator to meet the liability of appellants to persons who had stored corn therein. It is conceded that, acting under the custom before mentioned, appellants had shipped out the corn, selling it as their own and receiving the proceeds. It is now claimed that appellants were bailees merely of appellee's corn, and that the loss must be borne by appellee. No pretense is made that appellants had not shipped out corn indiscriminately from the warehouse, so as to materially reduce the amount of corn in store belonging to appellee and other parties. It is undoubtedly true, if the question arose between appellee and other depositors of grain intermingled in the warehouse, that each should be required, as between themselves, to accept his *pro rata* share. But that question does not arise in this case. By their voluntary shipment and sale from their warehouse, appellants materially reduced the amount in store belonging to appellee, which they could not have rightfully done if the

corn belonged to appellee, and they were bailees merely. By the custom proved, they had the right, if they saw proper, to use the corn left in store as their own and ship it, and use the proceeds thereof as their own, expecting to settle with the parties who stored the corn at whatever the market price might be when settlement was demanded by the storer. By assuming to treat the corn as their own, they gave a construction to the transaction wholly inconsistent with the theory that the grain remained the property of appellee.

Although nothing was said in respect of selling the corn at the time it was put into the warehouse, no one can, we think, read the evidence and escape the conclusion that it was understood by both parties to be a sale of the corn by appellee to appellants, to be paid for at the market price, upon some day in the future when appellee should demand payment. One of appellants testifies (quoting from the abstract furnished by their counsel): "It was our custom to ship our corn indiscriminately, according to the market, if we deemed best. If they [customers] delivered corn there, they had a right to call for the money at any time within thirty days, without charge. It was the universal custom to sell to us. . . . We took our chances on the rise and fall of the market." The other says that appellee was not then satisfied with the price, but thought it would go higher, and wanted to wait until the middle of the month. He further says: "I understood that he had a right to take the price when it suited him. That was all that remained to be done. It was for him to set the price and take the money."

If, however, the corn was in fact stored by appellee with appellants, it is apparent that, acting under the custom proved, the legality of which need not here be discussed, appellants shipped out, as before said, at least a portion of the corn so stored. If appellee understood appellants' mode of business, and is chargeable with notice of the custom under which they claim to act, upon the appropriation of his corn by appellants as their own he had the right of election to treat it as a sale, and demand the money therefor of appellants. It is conceded that he could have done this any day before the fire and the destruction of the corn in the warehouse, but having failed to make his election, it is said the corn remained his, and he must bear the loss. In this we cannot concur. Acting under the custom, appellants might exercise the right to determine that they would appropriate the corn to their own use, hold-

ing themselves responsible to appellee for the market price upon the day when he demanded settlement. This the evidence shows they did. Appellee was not bound to receive corn in the ear, or other corn not of like quality and grade with that delivered, nor a less quantity than he delivered, and might treat the conversion of a part as an election on the part of appellants to take the whole, under the custom proved. And if the custom was valid, and it cannot be questioned by appellants, they will be bound to settle with appellee for the corn stored at the price upon the day when settlement was demanded.

We are of opinion that the title to the corn delivered by appellee passed to appellants, and that they were liable to account to appellee therefor, and that recovery may be had as for goods sold and delivered: *McDonald v. Brown*, 16 Ill. 32; *De Clerq v. Mungin*, 46 Ill. 112.

The judgment of the appellate court is affirmed.

BAILEMENT AND SALE, DISTINCTION BETWEEN: See note to *Brets v. Diehl*, 2 Am. St. Rep. 711-713; and *Chickering v. Bastress*, 130 Ill. 206; 17 Am. St. Rep. 309; *Barnes v. McCrea*, 75 Iowa, 267; 9 Am. St. Rep. 473; *Woodward v. Semans*, 125 Ind. 330; 21 Am. St. Rep. 225.

WAREHOUSEMEN, DUTIES AND LIABILITIES OF: See note to *Schmidt v. Blood*, 24 Am. Dec. 145-160. It is the duty of warehousemen not to deliver goods or grain deposited to any other person than the depositor, except on his order, or by his consent or authority: *Velsian v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184. The delivery of grain for storage in a warehouse is a bailment, and the title thereto remains in the depositor: *Hall v. Pillsbury*, 43 Minn. 33; 19 Am. St. Rep. 209; whether the grain has or has not been mingled with the wheat of other persons in a common mass: *McBee v. Caesar*, 15 Or. 62; and if the warehouseman, without authority from the depositors, sells from the common mass, reserving enough to return to each depositor his proper quantity of the same quality and grade, the depositors may claim the grain so substituted for theirs: *O'Dell v. Leyda*, 46 Ohio St. 244.

SALE OF PART OF MASS, WHEN COMPLETE. — A sale of large and cumbersome merchandise, as of grain in bulk, may pass the title without actual separation of the quantity sold from the larger mass with which it is mixed, if the acts and declarations of the parties clearly evince an intent to make an immediate transfer of ownership: *Kimberly v. Patchin*, 19 N. Y. 330; 75 Am. Dec. 334. The general rule, however, is, that where the quantity is to be taken from a bulk, it must be set apart and delivered: *Low v. State*, 78 Ga. 66; 6 Am. St. Rep. 224.

CITY OF BLOOMINGTON v. BOURLAND.

[187 ILLINOIS, 584.]

INTERSTATE COMMERCE—SOLICITING ORDERS FOR DEALER IN ANOTHER STATE—LICENSE FEE.—A city ordinance requiring an agent for a wholesale book house situated in another state to take out a license and pay a license fee when soliciting book orders within the city is void, as an attempt to regulate commerce between the states. The fact that the sales made are at retail instead of wholesale, and that the ordinance makes no discrimination between those soliciting orders for houses within the state and those soliciting orders for houses in other states, makes no difference.

INTERSTATE COMMERCE—SALES OF GOODS IN OTHER STATES.—The negotiation of sales of goods which are in other states, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce, and cannot be interfered with or regulated by the state in which the negotiation is made.

ACTION to recover a penalty for violating a city ordinance, Defendant, a resident of Illinois, was an agent for a wholesale book house of St. Louis, Missouri. While soliciting orders in the city of Bloomington he was arrested and fined under an ordinance of that city for acting without a license. In soliciting such orders, he traveled from house to house, and after obtaining orders the books were to be shipped to him from St. Louis, to be delivered. The ordinance under which he was prosecuted provided, in effect, that no person should sell, nor attempt to sell, any goods, article, or thing by peddling, soliciting, hawking, etc., at any uninclosed stand or place of business within the city, without first obtaining a peddler's license therefor, and that every person soliciting, canvassing, or taking orders for books, etc., shall be deemed within the scope of this chapter, and be required to take out a peddler's license. The ordinance then provided for the infliction of a fine for the violation of any of its provisions, and the question submitted to the court was, whether or not the ordinance under the facts agreed upon is in violation of the constitution of the United States, and the federal statutes relating to interstate commerce. The court decided that it was, and rendered judgment against the city. From that judgment the city appealed.

Sain Welty, for the appellant.

J. E. Pollock and A. J. Barr, for the appellee.

SCHOLFIELD, J. We are unable to distinguish this case, in principle, from *Robbins v. Shelby Taxing District*, 120 U. S.

489. In that case Robbins was soliciting trade in Tennessee for a firm in Cincinnati, Ohio, and it was held that a law of Tennessee, requiring him to take out a license in order to transact his business, was in conflict with that clause of the constitution of the United States which gives to Congress the power to regulate commerce between the states, and therefore void. Substantially the same class of goods was there sought to be sold as is here sought to be sold; only there, it would seem, the attempt to sell was at wholesale, while here it is at retail. But that is not dwelt upon as a matter of any significance in the opinion in that case, and when it is reflected that it is the locality of the sales with reference to the locality of the ownership of the goods, and not the quantities of goods sold, or the number of persons to whom sold, that determines whether given sales are to be regarded as belonging to interstate commerce, it is impossible to see how it could be. It is manifest that in that case the court must have regarded the license fee as in the nature of a tax, as contradistinguished from a police regulation imposed for the protection of the public against the harmful tendency to the citizens of the district of the business itself, as the supreme court of Pennsylvania, in *Commonwealth v. Gardner*, 133 Pa. St. 284, hold that a license regulation in regard to hawkers and peddlers is. For where the business itself may be regulated or suppressed in a community because of its inherent harmful tendency to the citizens of such community, it may be regulated by a license, without regard to the locality of the property in which the business is conducted. But it is impossible to say that there may be injury or danger to the public welfare in permitting sales by retail, and yet not in permitting sales of the same thing in the same locality by wholesale, since, in the very nature of things, the difference is not in principle, but in the extent of its exercise only.

The fact that the ordinance makes no discrimination between those soliciting orders for houses in this state and those soliciting orders for houses in other states is of no moment. It was said in the Robbins case: "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers, — those of Tennessee and those of other states, — that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is car-

ried on solely within the state. This was decided in the case of the state freight tax: 15 Wall. 232. The negotiation of sales of goods which are in other states, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

The judgment is affirmed. ____

INTERSTATE COMMERCE, LICENSE TAXES WHEN VOID AS AN ATTEMPTED REGULATION OF. — The whole subject of interstate commerce is discussed in the extended note to *People v. Wemple*, 27 Am. St. Rep. 547-568. As to the power of states to exact licenses for the privilege of doing business within the state, see pp. 561-563 of that note.

PEOPLE v. BEATTIE.

[137 ILLINOIS, 532.]

ATTORNEYS — DISBARMENT OF — CAUSE FOR. — When an attorney at law procures a decree of divorce by introducing before the court testimony which he knows to be false and perjured, he is guilty of such unprofessional conduct as justifies his disbarment.

ATTORNEYS — CAUSE FOR DISBARMENT. — When an attorney in an action for divorce gives his client a paper purporting to be a certified copy of a decree of divorce, and thereby leads her to believe that she has been divorced by proceedings already had in court, and thereby also induces, enables, and assists her in procuring a marriage license and contracting marriage before obtaining a divorce, when he well knows, as a matter of fact, that no decree of divorce has yet been rendered or entered, or will be rendered or entered for some time thereafter, he is guilty of professional misconduct justifying his disbarment.

ATTORNEYS — DISBARMENT — CAUSE FOR. — When an attorney at law in an action for divorce permits his client to swear falsely to the jurisdictional fact of her residence, knowing her evidence to be false, and not informing the court of its falsity, and then introduces other evidence depending for its materiality upon such false evidence, such conduct is ground for his disbarment.

ATTORNEYS — DUTIES AND OBLIGATIONS. — An attorney at law owes his client the duty of fidelity, but he also owes the duty of good faith and honorable dealing to the courts before whom he practices his profession. He is an officer of the court, and his high vocation is to correctly inform the court upon the law and facts of the case, and to aid it in doing justice and arriving at correct conclusions. He violates his oath of office when he resorts to deception, or allows his client to do so. He is under no obligation to seek to obtain for those whom he represents that which is forbidden by law.

ATTORNEYS — CAUSE FOR DISBARMENT. — An attorney who suffers false and perjured testimony to be presented to the court, with the possible result of inducing the latter to take jurisdiction of a case in which there would otherwise be no power to act, and to grant a judgment or decree which

the law would prohibit if the real character of the offered evidence were known, cannot shield himself behind his supposed obligations to his client. Such conduct justifies the court in revoking his license, and striking his name from the roll of attorneys.

George Hunt, attorney-general, and H. J. Kendig, for the relator.

W. P. Black and C. S. Beattie, for the respondent.

MAGRUDER, J. This is an information by the attorney-general, in the name of the people, at the relation of five members of the bar of Cook County, in this state, charging Charles J. Beattie, the respondent herein, a practicing attorney in the city of Chicago, with unprofessional conduct, and asking that an order be entered striking his name from the roll of attorneys of this court, and debarring him from the right to practice law, or to exercise the powers or privileges of a licensed attorney, in the state of Illinois.

The charges against the respondent grow out of his conduct in a divorce suit begun and managed by him as the solicitor of the complainant therein. The suit was commenced on March 4, 1887, in the superior court of Cook County, by Mrs. Ada E. Gordon, for the purpose of obtaining a divorce from her husband, George B. Gordon, upon the alleged grounds of cruelty, desertion, and adultery. A hearing of the case was had upon Saturday, May 7, 1887, at which the complainant, Mrs. Gordon, was examined orally before the court, her testimony being taken in short-hand by a stenographer. At the close of her evidence, respondent, as her solicitor, handed to the judge for his examination the depositions of A. S. and Mary Hallowell, theretofore taken in Canada to sustain the charge of cruelty, and the deposition of James L. Watson, theretofore taken in Chicago to sustain the charge of adultery. A decision was reserved until the judge could examine these depositions, and until he had also further considered the testimony of Mrs. Gordon, which was written up by the short-hand reporter, and handed to him. In the course of two or three weeks he informed respondent that he did not regard the evidence as sufficient to justify the entry of a decree, and thereupon respondent caused to be examined orally before the court, on May 27, 1887, another witness, called by the name of R. J. Coffeen, for the purpose of further sustaining the charge of adultery. On the next day after the examination of the last witness, to wit, on May 28, 1887, a decree was entered granting a divorce upon the ground of adultery alone.

1. It is charged that, in the affidavit and publication notice as to the non-residence of George B. Gordon, respondent stated such residence to be in "Buenos Ayres, in the empire of Brazil, South America," when he knew that Buenos Ayres was in the Argentine Republic, and not in Brazil. If the charge were true, the purpose of such statement of the residence could only have been to prevent Gordon from receiving the notice required by the statute to be sent by mail. Respondent says that Mrs. Gordon told him her husband lived in Buenos Ayres, Brazil, and that he did not know that there was not a Buenos Ayres in Brazil. She contradicts him in regard to the matter, but we give him the benefit of the doubt, and hold that this charge is not sustained.

2. It is charged that the respondent made contradictory and inconsistent statements under oath as to the date of Coffeen's examination before the court. We are satisfied from all the evidence, and particularly from that of Latham, the short-hand reporter who took notes of the examination, that Coffeen testified before the court on May 27th, and not on May 7th. It is true that, in his testimony given upon the present hearing, and in two answers under oath filed in March, 1889, the respondent stated at one time that Coffeen was examined on May 7th, and at another time that he was examined on May 27th. He urges in explanation of this matter that he did not intentionally misrepresent the date, but was at fault in his recollection. We give him the benefit of his explanation in regard to this charge.

3. It is charged that the respondent obtained the decree that was entered by introducing before the court testimony which was false and perjured, and which he knew to be false and perjured. The evidence of Watson was almost identically the same as that of Coffeen. These two witnesses — if there were two men whose real names were Watson and Coffeen — swore that George B. Gordon lived for about a month, in the winter of 1885, at the boarding-house of one Mrs. Giles, at No. 2126 Wabash Avenue, in the city of Chicago, in an open state of adultery with a woman who was not his wife but whom he represented to be his wife. These witnesses also swore that they were themselves boarding and occupying rooms at the same place during the same month, and in this way knew that Gordon and the woman referred to slept in the same room. It is proven conclusively that there was no such boarding-house at the place named during the time

mentioned; that no such man as Watson, nor any such man as Coffeen, ever boarded there, and that George B. Gordon was never in Chicago after the summer of 1882 until January, 1889. The so-called Watson and the so-called Coffeen have never been seen or heard of since they testified in this case. Their testimony, upon which alone the decree of divorce was based, was false in every particular.

It is claimed by the people that Watson and Coffeen were one and the same person, and that a man named F. G. Coffey, who had been in the service of the respondent for several years, posed as a witness at one time under the name of Watson before a notary taking his deposition, and at another time before the court under the name of Coffeen. This claim, however, is not sustained by the proofs, but the respondent himself does not deny that the testimony of Watson and Coffeen was manufactured. He says that he examined these men as witnesses, and introduced their statements before the court, because he was imposed upon by his client, and made by her to believe that the evidence in question was *bona fide*.

Mrs. Gordon, who lived in Toronto, Canada, first learned of respondent as an attorney in December, 1886, through his advertisement in a newspaper. She then opened a correspondence with him, and quite a number of letters passed between them during the period from December 15, 1886, to March 4, 1887. On the latter day, she appeared in Chicago, and met the respondent for the first time at his office in that city. On the same day, he prepared and filed her bill for divorce. She remained in Chicago about three weeks, and returned to Toronto. She was not again in Chicago until the sixth or seventh day of May, 1887, when she came back to be present at the hearing. A number of letters passed between her and the respondent during the period from her return to Toronto in March and her second visit to Chicago in May.

Respondent states that Mrs. Gordon told him about the acts of adultery committed by her husband in Chicago when she was there in March, and at the same time gave him the names of Watson and Coffeen as the witnesses by whom she expected to prove such acts. He also states that on March 14, 1887, he prepared and read over to Mrs. Gordon a notice to take the deposition of Watson on April 23, 1887, before a notary named G. R. Tucker, in Chicago, and that this notice was addressed and mailed to her husband at "Buenos Ayres, Brazil, South America." He furthermore swears that a man

calling himself Horace R. Milbourn, and announcing himself to be a private detective from Toronto, brought Watson to his office on the afternoon of April 23, 1887. On the same afternoon, between five and six o'clock, the deposition of Watson was taken by respondent before Tucker at the latter's office.

Mrs. Gordon swears that she never heard of Watson, nor of any acts of adultery committed by her husband in Chicago, until she went there in May, 1887, when, to her surprise, the respondent told her, for the first time, of his own discovery of Watson, and of the latter's knowledge of her husband's alleged conduct in Chicago. She also swears that she never authorized respondent to charge her husband with adultery committed in Chicago; that she never gave to him the names of Watson and Coffeen; that she never heard of Coffeen until 1889, when her husband returned from South America and instituted proceedings to set aside the decree of divorce; that she never heard of Milbourn. She is confirmed in her statements by a witness named M. H. Wilson, who came with her from Toronto to Chicago in May, 1887, and swears that he was present at the interview between her and respondent when the latter told her of his accidental discovery of Watson's knowledge of the adultery in Chicago. Wilson also swears that no mention was then made of either Coffeen or Milbourn, and that he never heard of either of them until long after the divorce was granted.

We do not place any reliance upon the unconfirmed statements of Mrs. Gordon, in view of the false evidence given by her as hereafter referred to. Wilson, although unimpeached and uncontradicted in the material parts of his testimony, was influenced by a strong bias in her favor, as she evidently sought the divorce in order to marry him, and did marry him under the circumstances hereinafter related. If the question, whether or not the respondent knew the real character of the evidence given by Watson and Coffeen when he introduced it in court, depended upon the testimony of Mrs. Gordon and Wilson as weighed over against his own explanations, he would clearly be entitled to the benefit of the doubt which would exist in his favor. But a majority of the members of the court are unable to reconcile the correspondence in the record with the statements which respondent makes upon this hearing.

The letters which passed between him and Mrs. Gordon prior to her coming to Chicago in March, 1887, make no reference whatever to the subject of adultery. They abound in

inquiries on her part and answers on his part, as to the requirements of the Illinois law when a divorce is asked upon the grounds of cruelty and desertion. She had lived in Winnipeg, Manitoba, with her husband, who was a practicing lawyer, for several years prior to July, 1884, when a separation took place between them. In March, she had expressed to the respondent her suspicions that improper relations had existed between her husband and a lady in Winnipeg, but had also stated that she would not be able to verify her suspicions by proof. She first alludes to the subject of adultery in her letter of April 11, 1887, to the respondent, and therein states that she had consulted a prominent Canadian lawyer, who had advised her that a divorce obtained in the United States for any other cause than adultery would not be recognized in Canada, and then suggests that a private detective in Winnipeg be employed to make inquiries there as to his movements while he was in that place. If, in March, she had informed respondent that she could prove her husband's adultery in Chicago, and had given him the names of Watson and Coffeen as the witnesses who would furnish such proof, why does she not refer to it in the letter of April 11th? Why does she propose to send to Winnipeg to get the evidence, which she had already provided for getting in Chicago?

She again wrote to respondent on April 25, 1887, and refers to the subject of procuring evidence of adultery in Winnipeg. No reference is made to Watson and Coffeen. If she knew, before she left Chicago in March, that Watson would be examined in Chicago on April 23d as to her husband's adultery committed in that city, why does she make no allusion to it in her letter of April 25th? Why does she not ask whether Watson's testimony had been taken on the 23d, according to the notice given and the arrangement made in March? Why does she still talk of looking up evidence of adultery in Winnipeg, if she knew that respondent had two days before obtained evidence of adultery in Chicago?

On April 27, 1887, the respondent answered the letters of April 11th and 25th, and in his answer commented upon the Hallowell depositions as not being strong enough in their proof of cruelty; sent a commission to take the depositions of Mr. and Mrs. Smith, who could only testify to facts bearing upon the question of desertion, with the request that the depositions be taken on the next Monday and forwarded by mail; claimed that no foreign court could inquire into the regularity

of decrees of Illinois courts of chancery; and closed with the following words: "If you are here the Thursday of next week, it will be ample time to be ready for trial." On April 23d respondent had taken the deposition of Watson, and yet makes no mention of that fact in the letter of April 27th, although the latter letter was written in response to two communications from Mrs. Gordon, which suggested the idea of seeking in Winnipeg the same kind of evidence which Watson had already given in Chicago. If Watson's testimony was genuine and *bona fide*, and believed to be such, why not speak of it? Was respondent afraid that Mrs. Gordon would rebel against the introduction of that testimony as false? Or was he so conscious of its falsity that he dared not mention it in a letter?

On April 29th Mrs. Gordon wrote to respondent, expressing her astonishment at his comments upon the Hallowell depositions, chiding him for his failure to take the depositions, upon the subject of cruelty, of Miss Clark in Canada, and Miss Abby in England, and using the following language: "I feel so vexed, for you've had plenty of time since March, and I certainly see no use in going to Chicago next week, as there'll be no evidence at all. . . . If you were too busy to undertake my case and do it justice, . . . why did you not tell me so, and all this time would have been saved? If put off now, as it must be, to collect more evidence, how long will I have to wait? . . . I cannot afford to go up to Chicago till quite necessary. . . . I have written to Winnipeg myself now to see if any other evidence can be obtained, and you will likely hear from there shortly. It is useless speaking of our courts as you do, for of course you don't know our laws; and if what evidence I suggested could be obtained, I don't see why you object to trying to get it for me. . . . Our lawyers here must know what is right. . . . The thing now is this: when will it have to be deferred to? What is the earliest date? And will you try for Miss Clark's evidence, or not?" etc.

This letter of April 29th is wholly inconsistent with the idea that Mrs. Gordon, when writing it, had any knowledge of what Watson had sworn to, or of what Coffeen was ready to swear to. If she had such knowledge, it is impossible to believe that she would have written: "I certainly see no use in going to Chicago next week, as there'll be no evidence at all." If she had known that there was proof of her husband's un-

faithfulness in Chicago, she would not have spoken of writing to Winnipeg to get such proof. She would not have reproached the respondent for his unwillingness to aid her in getting such proof at Winnipeg, if she had been aware that he already had it in Chicago.

All the letters on both sides, both those written before the visit to Chicago in March, and those written after such visit, are entirely silent upon the subject of adultery in Chicago, and upon the subject of any evidence to establish the commission of that crime in Chicago. But that which we find it most difficult to understand is the following letter, which respondent wrote to Mrs. Gordon on May 2, 1887, five days before the hearing:—

“MRS. ADA E. GORDON, — Your very ill-natured letter of the 29th ult. has been received. In reply, permit me to say that I wrote a letter to Kate Clark, and sent commission to take her deposition in your case, on the same day that I wrote to Mr. Hallowell, and sent commission to take his deposition. Kate Clark has not answered my letter, and the commission has not been returned (or her deposition) to the superior court. I have performed my duty, if the Clark woman failed in hers. When you gave me in detail the facts and circumstances of your case, you stated very distinctly and unequivocally that you could not prove adultery against your husband, and you relied on the ground of ‘cruelty’ and ‘desertion’ for a decree. Since then you have, you say, been advised by other counsel, that in order to have a valid decree you must prove adultery against your husband, and you suggest to me the employment of a detective for that purpose. I assure you that I never employ detectives in my cases,—they are generally vile knaves who deal in falsehood and perjury; but if my clients desire to employ them they have the right to do so. I am not the keeper of their consciences. If a detective offers testimony that seems fair on its face, and I have no knowledge that it is false, I will present it in the case, but I will not employ a detective or advise his employment. In this case there is no defense, and your testimony will stand uncontradicted, and with the corroborating testimony of the Hallowells you will obtain a decree of divorce on the grounds of cruelty and desertion. That of course was the original design and the scope of the bill. If you are here on Saturday next, you will have your decree; if you are not here, it is no fault of mine. However, it may be as well to understand that I never suffer any

scolding or dictation from my clients. I know better how to conduct their cases than they do, and I conduct my cases my own way. If you could have proved adultery, you ought to have filed your bill where the adultery was committed, and not have waited to gain a residence here for that purpose."

A little more than a week before he wrote this letter, respondent had taken the deposition of Watson and had it in his possession, and intended to present it to the court on the hearing, and did afterward so present it. What reason could there be for the ominous omission of all reference to that deposition in the letter of May 2d?

If, when Mrs. Gordon gave him "in detail the facts and circumstances" of her case, she told him about Watson and Coffeen, and the woman at 2126 Wabash Avenue, why does he say to her on May 2d, "You stated very distinctly and unequivocally that you could not prove adultery against your husband"? Here is an admission that she told him, when she was in Chicago in March, that she could not prove adultery against her husband. He says that he was angry and excited when he wrote the letter, and intended to refer to adultery in Winnipeg, and not to adultery in Chicago, and neglected to insert the words "in Winnipeg." This explanation is not satisfactory. He uses a general term, without any limitation as to place. There is the same omission of the words "in Winnipeg," when he speaks of the advice given by other counsel, that she "must prove adultery." What is the meaning of the last sentence of the letter? In telling her that if she could prove adultery she ought to have filed her bill where the adultery was committed, he negatives the idea that she could prove adultery where the bill had already been filed. The intimation is as plain as it can be, that the bill had been improperly filed in Illinois if the divorce was to be asked upon the ground of adultery. It seems like mockery to talk thus to a woman, who already knew that Watson had sworn to the occurrences at 2126 Wabash Avenue, and that Coffeen stood ready to take the stand in confirmation of Watson.

It is impossible to reconcile the letter of May 2d with that sense of right which should mark the conduct of an honorable lawyer. If Mrs. Gordon had told respondent that she expected to prove adultery in Chicago by Watson and Coffeen, then the language of his letter of May 2d is untruthful, and could only have been intended as a mask. If she was ignorant of the false testimony, the silence of this letter can be

attributed to nothing else than the fear to state in writing what she might not approve of, and what might thereafter work harm to himself. He says: "I never saw her between the time that she left my office, three weeks after the filing of the bill, and the time that she returned, on the 7th of May. She communicated to me nothing in the mean time, unless what appears in her letters."

Respondent says, in reference to the letter of May 2d: "It was a letter that she could understand very distinctly, and that she could not make any mistake about," etc. If, when he said to her, "You stated very distinctly and unequivocally that you could not prove adultery against your husband," she thereby understood him to say that she had stated that she could prove adultery against her husband in Chicago, then he and she were cloaking their thoughts in language which had different meaning for them from that which would be conveyed to anybody else. If such a construction as this is to be placed upon the letter, the conclusion is irresistible that the respondent was aiding and abetting his client in a scheme to impose false evidence upon the court.

Elsewhere in his testimony respondent speaks as follows of the letter of May 2d: "Of course it can be seen by any one that there are portions of it that contradict the whole record in the case. . . . It can be perceived by this letter that I could not have had the circumstances of her case in mind, because I stated to her in this letter that she should not wait to gain a residence here. Of course nobody ever claimed that she waited to gain a residence here, so that that particular part of the letter must have had reference to something else; at least, I must have had the circumstances in my head of some person waiting here to get a decree instead of Mrs. Gordon," etc. It does not seem natural or reasonable to suppose that the references in the letter of May 2d were to some other suitor than Mrs. Gordon, and to some other case than hers. Such a supposition can hardly be creditable to the shrewdness or intelligence of a man who had practiced law for more than thirty years, even after all allowances are made for the effects of anger and forgetfulness.

4. It is charged that the respondent gave to Mrs. Gordon on May 7, 1887, a paper purporting to be a certified copy of a decree of divorce, and thereby led her to believe that she had been divorced by the proceedings had in court on that day,

when, as matter of fact, he knew that no decree of divorce had yet been entered, or would be entered for some time thereafter.

It is proven, beyond question, that respondent gave Mrs. Gordon a copy of a decree of divorce on May 7th, shortly after the hearing in court in the forenoon of that day. The copy has been produced in evidence, and is in the record. It is drawn upon a printed form, eleven lines of it being in print, and eleven or twelve lines being in the handwriting of respondent. It is in the usual form of a decree of divorce, finding the defendant guilty of both adultery and cruelty as charged in the bill, and giving the custody of the child to the complainant. It has the title of the cause and general number of the case upon its face. On the back of it are indorsed the general and term numbers, the name of the superior court of Cook County, the title of the case, and the name of the respondent as solicitor. It has no date. Upon its face and at the bottom of it are the notarial seal of the respondent, and these words, written in his own handwriting: "A true copy. Chas. J. Beattie."

It is also proven, beyond question, that on May 7th, shortly after the hearing before the court, Mrs. Gordon and Wilson obtained a marriage license from the office of the county clerk of Cook County, and were married on that day in Chicago by James S. Green, a minister of the Gospel, and left in the afternoon of the same day for Toronto, with the copy of the decree given to them by the respondent in their possession.

Mrs. Gordon and Wilson both swear that when they came out of the court-room in the forenoon of May 7th, after the proceedings there had, respondent congratulated them, and said he had obtained the divorce, and took them down-stairs to the county clerk's office, and introduced them to the clerk in charge of marriage licenses, thereby enabling them to procure a license; that they then went over to respondent's office, and he drew in their presence, and gave to them, the copy of the decree above mentioned, stating to them that such copy was all that it was necessary for them to have in order to be married, but that if they chose to wait until the following Monday, he would give them another copy with the court's seal upon it, or would send the latter to them if they preferred to go home at once; that they then went to a clergyman and were married; that a few days after the 28th of May they received from him by mail the copy with the court's seal upon it.

Respondent swears that he never went to the county clerk's

office with Mrs. Gordon and Wilson, and knew nothing about their marriage until he received a letter from her dated May 16th, and signed "Ada E. Wilson." He admits that he gave her the copy of the decree above described, but says that Mrs. Gordon came into his office on May 7th, while he was engaged in preparing such a decree as he believed, and had reason to think, would be entered; that she desired a copy to take home with her, "showing the trial of the proceeding"; that, "without giving much consideration to the matter, and knowing that said Gordon understood the situation perfectly and fully, respondent replied that he did not see that there was any special objection to this, and thereupon made hastily a copy of the proposed draught of the decree, certified it as a true copy, and handed it to her, at the same time promising her that, as soon as he could procure the decree to be entered, he would send her a duly certified copy.

The correspondence between Mrs. Gordon and respondent before May 7th shows that she intended to marry Wilson as soon as the divorce was obtained. Such intention on her part must have been well known to the respondent. A number of letters were written by Mrs. Gordon and Wilson to the respondent between May 7th and May 31st, no one of which in express terms informs him of the fact of their marriage, but all of which assume that he knew all about the marriage. These letters ask him to send forward the copy of what they call "the record of the court." They indicate very plainly that the writers, who were residents of a foreign dominion, were ignorant of the course of legal proceedings in American courts, but the language of the letters clearly shows the belief of both Wilson and Mrs. Gordon that there was already a "record" of the decree of divorce. They were asking for a copy of "the record of the court" as made, and not the copy of a record to be made. Respondent admits that he learned of their marriage through the letter of May 16th, and yet, although the decree of divorce was not actually entered until May 28th, he never advised them of the illegality of such marriage.

A majority of the members of the court are not satisfied with respondent's explanation of his conduct in giving to these parties this copy of a decree. Of what was the paper thus given them a copy? When it was handed to them on May 7th, no decree of divorce had been granted. None was granted until May 28th, and then for adultery only, and not

for cruelty. Respondent could not have known certainly, when he furnished this copy, that the divorce would be allowed at all. The oral evidence of Mrs. Gordon had not then been written up and submitted to the court, as was required by the rules of practice in divorce cases, nor had the depositions of Watson and the Hallowells been then examined by the court. As matter of fact, the testimony of all these witnesses was afterwards held to be insufficient. It was a most extraordinary act to give to these parties, under the circumstances then existing, a certified copy of a decree which had not yet been entered. When a paper is certified to be a true copy, the general understanding is, that it is intended to be a true copy of something already existing, and not of something which is to be brought into existence in the future. The granting of the marriage license, the furnishing of a copy of the decree, and the marriage itself were three occurrences, which took place within so short a time of each other, that they may almost be regarded as parts of one transaction; and the conclusion is almost irresistible, that the license would not have been issued, and the marriage would not have taken place on that day, if the copy in question had not been made out and given to the parties.

If respondent assisted Mrs. Gordon and Wilson in obtaining a license on May 7th with a view to their marriage on that day, he aided in the consummation of an unlawful marriage, because he knew that she was not then legally divorced. If he gave them the paper purporting to be a copy of a decree, and thereby induced them, or permitted them, to believe that the court had granted a divorce in the pending case, he deceived them, and placed it in their power to consummate an illegal marriage, whether he actually knew of such marriage or not. If he gave them the copy in question, accompanying it with the information that it was merely the draught of a proposed decree, and that no decree had been actually entered, but with the understanding that they were to show it to their friends in Canada as evidence of a divorce, then he aided them and united with them in the perpetration of a fraud. He had said to Mrs. Gordon in the letter of May 2d: "If you are here on Saturday next, you will have your decree." This language, taken in connection with the fact that on May 7th, which was the Saturday referred to, he did actually give her a copy of a decree, tends to confirm her statement and that

of Wilson, that they were induced to regard such copy as evidence of a divorce legally granted on that day.

5. Another charge made against the respondent is, that he attempted to deceive and impose upon the court, and to induce the court to grant a divorce upon the ground of cruelty committed in Canada, by permitting evidence to be presented to the court for the purpose of showing that Mrs. Gordon had resided one year in Cook County, Illinois, prior to the filing of her bill, when he knew such evidence to be false, and that Mrs. Gordon had never been a resident of Cook County, but was and had always been a resident of Canada.

All the members of the court are of the opinion that this charge is sustained by the proof, and that the conduct of the respondent in relation to the matters involved in the charge was an inexcusable violation of his duty as a practicing lawyer. We proceed to give the reasons upon which we base the conclusion thus reached.

Section 2 of the divorce act of this state provides that "no person shall be entitled to a divorce in pursuance of the provisions of this act who has not resided in the state one whole year next before filing his or her bill or petition, unless the offense or injury complained of was committed within this state, or whilst one or both of the parties resided in this state." Therefore, where a wife seeks a divorce from her husband in Illinois for acts of cruelty which have been committed outside of this state, or for desertion which has taken place outside of this state, she will not be entitled to the divorce, unless she shows, either that she had resided in the state one whole year next before filing her bill, or that her husband was guilty of such cruelty or desertion while he or she or both of them resided in Illinois. Respondent admits that he knew this to be the law, and that he so advised Mrs. Gordon in his consultations with her.

In the divorce case now under consideration, it was not claimed or pretended that the defendant was guilty of cruelty or desertion while he or his wife or both of them resided in Illinois.

The respondent admits that the only cruelty and desertion which Mrs. Gordon charged against her husband took place in Canada, and that he knew such to be the fact when he filed the bill. He says in his testimony: "When she gave me the facts of her case, she simply stated to me that she could only prove desertion and cruelty in Winnipeg, in Canada."

When respondent filed the bill for Mrs. Gordon, he knew that she was not then a resident of Illinois, and that she had not resided in Illinois one whole year "next before filing her bill." He admits both in his answer and in his testimony that he knew her to be a non-resident of this state. He says: "She never told me she was a resident of this state; she told me she was a resident of Canada."

It follows that when Mrs. Gordon's bill was filed, on March 4, 1887, she was not entitled to a divorce in this state on the ground of either desertion or cruelty: 1. Because she had not resided one whole year in Illinois; 2. Because the only cruelty or desertion which she could prove had taken place outside of Illinois. All her proof of cruelty or desertion would be immaterial and valueless without proof of a year's residence in Illinois next before the filing of her bill. Such being the state of the case, and such state of the case being well understood by the respondent, what did he do?

He inserted in the bill for divorce the following allegation: "Your oratrix is an actual resident of the city of Chicago, in the county of Cook and state of Illinois, and has resided continuously in said city, county, and state for and during the last preceding five years, and within the territorial jurisdiction of this honorable court." This statement was false, and was known by the respondent to be false, when he wrote it, and permitted Mrs. Gordon to sign the bill containing it. He explains its insertion in the bill by saying that it was a merely formal allegation, and that the bill was not sworn to. Without stopping to comment upon the sufficiency or insufficiency of the explanation thus offered, we proceed to notice what further steps the respondent took in the premises.

On April 6, 1887, he had commissions issued to take the depositions of Kate Clark and of A. S. and Mary Hallowell in Canada, for the purpose of proving cruelty. On April 27, 1887, he had another commission issued to take the depositions of Mr. and Mrs. Smith in Canada, for the purpose of proving desertion. He well knew that the cruelty and desertion which he thus sought to establish had occurred in Canada, and not in Illinois. He knew that whatever the Hallowells would say in response to the interrogatories, which he drew and addressed to them, calling for a statement of such instances of cruelty as they had knowledge of, would have reference to acts done outside of this state. Why did he issue these commissions, if the allegation above quoted was merely formal?

The depositions, when returned, would be utterly worthless without proof of a year's residence in Illinois.

In the letter of May 2d, after the depositions of the Hallowells had been taken, respondent wrote to Mrs. Gordon, that, with their testimony and her own, she would "obtain a decree of divorce on the grounds of cruelty and desertion; that of course was the original design and scope of the bill." As the only cruelty or desertion which the Hallowells had testified to, and which Mrs. Gordon could truthfully testify to, had occurred in Canada, it is difficult to understand how she could obtain a divorce on either of those grounds, unless it was the intention at that time to attempt to show upon the hearing that she had resided one year in Illinois. If proof of such residence was to be offered, it cannot be said that the allegation of the bill was designed to be a merely formal matter. Such allegation must have been regarded as being more than formal when it was inserted in the bill, if "the original design and scope of the bill" was to obtain a divorce for acts of cruelty and desertion which had taken place no where else except in Canada.

Let us see what took place at the hearing on May 7th. In giving her testimony before the court, Mrs. Gordon swore that she had lived in Cook County one year continuously prior to the filing of her bill. By so swearing she committed perjury. She says: "He [Mr. Beattie] told me on the way over to the court-house that if the judge asked me if I lived here a year, I was to say yes." Respondent denies that he told her thus to swear to what was false. Let it be admitted that he, rather than she, is to be believed. What then? He sat in the court-room and heard her false statement, and permitted it to go unchallenged. That no injustice may be done him, we quote his explanation. He says in his answer to the information: "It is true that said Ada E. Gordon did, in answer to certain questions put to her by the court, state that she had been a resident of the state of Illinois continuously for one year preceding the filing of her bill, which statement was a great surprise to this respondent, and was understood at the time by respondent to be untrue in fact. But respondent regarded the testimony at the time as immaterial, in view of the evidence in the case establishing the commission of adultery by the defendant in Chicago, and being taken by surprise by the client in said testimony, respondent, called upon suddenly to determine whether to allow to pass a statement made by his client

for which respondent was in no wise responsible, which was untrue in fact, but was at the time by respondent deemed to be immaterial, or to then and there correct such statement, with the possibility that he would thereby discredit his client before the court, and possibly prejudice her case, respondent permitted the evidence to pass without question or correction, feeling that the responsibility therefor could in no wise be charged against him, as his client was a woman of exceptional intelligence, and had been distinctly advised by respondent in advance that it was not necessary to either aver or prove residence in Cook County, in view of the evidence establishing the commission of adultery in said Cook County."

According to this explanation, there was a conflict in his mind between his sense of duty to the court and his sense of duty to his client. Being in doubt whether to call the attention of the court to the false testimony, or to let it pass in silence, he finally chose the latter course. Whether or not silence was justifiable under these circumstances, it is not necessary to inquire. It is sufficient to say that the respondent was not content with silence. After his client's falsehood was uttered, he sought to make use of it. He continued to press upon the attention of the court the question of the defendant's alleged cruelty, knowing that proof of cruelty would be immaterial without the false statement as to residence to rest upon.

The record shows that after the judge had ceased to examine Mrs. Gordon, the respondent himself asked her the following question, and received the following answer: "I will ask you if at any time he was cruel to you by way of physical cruelty? A. Yes, sir; he knocked me down-stairs and struck me." Respondent knew that the evidence thus called out was of cruelty that had taken place in Canada, and yet just a moment before he had heard the witness falsely swear to a year's residence in Illinois, without which residence the cruelty in Canada would be unavailing.

But this was not all. Respondent took no steps to withdraw the testimony upon the subject of cruelty, and submit his case upon the charge of adultery. On the contrary, as soon as Mrs. Gordon had left the witness-stand, he handed up to the court the depositions of the Hallowells, tending to prove acts of cruelty committed outside of the state of Illinois, in order that such depositions might be considered by the

court in connection with the false testimony of his client as to a year's residence in Illinois.

Proofs were presented to the court in support of the two charges of cruelty and adultery. The case was placed before the mind of the judge in such a way that he might grant the divorce on either one of the charges, or on both, according to his view of the sufficiency of the evidence. He was imposed upon by the sworn statement of the complainant as to her residence in Illinois. If he had known that her statement was false, he would not have considered the testimony as to cruelty, but he did consider it.

The lawyer's duty is of a double character. He owes to his client the duty of fidelity, but he also owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession. He is an officer of the court, — a minister in the temple of justice. His high vocation is to correctly inform the court upon the law and the facts of the case, and to aid it in doing justice and arriving at correct conclusions. He violates his oath of office when he resorts to deception, or permits his clients to do so. He is under no obligations to seek to obtain, for those whom he represents, that which is forbidden by the law. If he suffers false and perjured testimony to be presented to the presiding judge, with the possible result of inducing the latter to take jurisdiction of a cause in which there would otherwise be no power to act, and to grant a judgment or decree which the law would prohibit if the real character of the offered testimony were known, he cannot shield himself behind his supposed obligations to his client. A non-resident of Illinois has no right to a divorce for acts of cruelty committed outside of Illinois, no matter how extreme or repeated such acts may have been. In such cases, residence in the state is a jurisdictional fact.

But the respondent went even farther. On the very day on which the false evidence was given by his client, he prepared a draught of a decree to be submitted to the court, and did afterwards so submit such draught. He says in his evidence: "I had in the mean time prepared . . . a draught of the decree, hoping to present it to the judge that afternoon if I could find him." In his answer to the information he says: "Respondent went to his office and proceeded to prepare . . . a draught of the decree, which he supposed would be entered, in view of the testimony that had been given; . . . the original

draught of this proposed decree was given by respondent to the court." A copy of the draught of the decree thus referred to has been introduced in evidence, and is in the record. It contains the following findings: "That the said defendant has, since the time of his marriage with the complainant, been guilty of adultery as charged in said bill of complaint, and that the said defendant has also been guilty of extreme and repeated cruelty as charged in said bill of complaint."

It is true that after the judge had examined all the evidence submitted to him, including that of Coffeen, taken on the 27th, he erased the finding as to cruelty, and entered the decree upon the finding as to adultery. Nevertheless, the fact remains that the respondent presented a decree to the court containing a finding that the defendant had been guilty of cruelty, and expected that it would be entered, "in view of the testimony that had been given." What was the testimony that had been given? Testimony that the complainant had resided one year in Illinois, as well as testimony that acts of cruelty had been committed.

It is clear that in the preparation of the bill, in the taking of depositions, in the examination of witnesses upon the hearing, in the submission of testimony to the court, in the draughting of the decree presented to the court, the respondent intended to take his chances, and did take his chances, of procuring a decree either upon the ground of adultery or upon the ground of cruelty. The conclusion is abundantly established, that he intended to deceive and attempted to deceive the court by testimony of his client as to a residence in Illinois which he knew to be false.

Some unworthy act has been encountered at every stage in the investigation of this divorce case. No step can be taken in it without meeting with something that requires explanation. From the beginning to the end of it, the proceeding was a gross fraud,—an outrageous imposition upon the administration of justice. It is impossible that any lawyer of intelligence could have conducted it without seeing and knowing its real character. If Mrs. Gordon originated and inspired all the wrong that was done, her solicitor either actively assisted her, or purposely shut his eyes to what she was doing. Her case had no merits whatever.

Let the rule in this case be made absolute, and let an order be entered striking the name of Charles J. Beattie, the re-

spondent herein, from the roll of attorneys of this court, in accordance with the prayer of the information filed by the attorney-general.

ATTORNEYS, DISBARMENT OF: See extended notes to *Burns v. Allen*, 2 Am. St. Rep. 850-853; *State v. Kirke*, 95 Am. Dec. 338-345; *Delano's Case*, 42 Am. Rep. 557-565. The court will, of its own motion, disbar an attorney for unprofessional conduct appearing from the face of the record of a case in which he is acting as attorney: *In re Henderson*, 88 Tenn. 531.

METROPOLITAN NATIONAL BANK v. JONES.

[187 ILLINOIS, 634.]

BANKS AND BANKING — CHECKS — RIGHTS OF PARTIES TO — ACCEPTANCE OF.

— There is no such thing as "acceptance" of checks in the ordinary sense of the term. A check being payable immediately and on demand, the holder can only present it for payment, and the bank can fulfill its duty to the depositor only by paying the amount demanded. The holder has no right to demand from the bank anything but payment of the check, and the bank has no right, as against the drawer, to do anything but pay it.

BANKS AND BANKING — CHECKS — EFFECT OF CERTIFICATION OF. — When the holder, on making presentment of a check to the bank, instead of demanding and receiving payment, has the check certified, and retains it in his possession, he enters into a new and express contract with the bank, not within the scope of the legal relations of the parties, nor within the presumed intention of the drawer.

BANKS AND BANKING — CHECKS — EFFECT OF CERTIFICATION OF. — By certification of a check the bank enters into an absolute undertaking to pay it when presented at any time within the period of limitation of actions. The transaction between the holder and the bank is, in legal effect, the same as though the holder had received payment, and had deposited the money with the bank, and received a certificate of deposit therefor.

BANKS AND BANKING — CHECKS — EFFECT OF CERTIFICATION. — The liability of a bank after certification of a check is independent of the question of its possession of the requisite amount of funds of the drawer, it being by the act of certification estopped to deny the possession of sufficient funds.

BANKS AND BANKING — CHECKS — EFFECT OF CERTIFICATION. — A bank, by certification of a check, becomes entitled to charge the amount thereof to the account of the drawer at the time of certification, thus appropriating to the payment of the check the necessary amount of money on deposit to the credit of the drawer.

BANKS AND BANKING — CHECKS — EFFECT OF CERTIFICATION. — As between the bank certifying a check and the drawer, the certification has the same effect as payment, the funds representing the amount of the check being as effectually withdrawn from the control of the drawer, and the indebtedness from the bank to the depositor, created by the deposit,

being as effectually satisfied to that amount, in the one case as in the other.

BANKS AND BANKING — CERTIFICATION OF CHECK RELEASES DRAWER. — A bank, by certifying a check, becomes the principal and only debtor, and the holder, by taking a certificate of the check from the bank, instead of requiring payment, discharges the drawer, and the check then circulates as the representative of so much cash in bank, payable on demand to the holder.

BANKS AND BANKING — CERTIFICATION OF CHECK — EFFECT OF — DISCHARGE OF HOLDER. — When the holder of a check presents it and procures it to be certified by the bank instead of being paid, such certification is, as between the holder and the drawer, a payment, and discharges the drawer from liability, and its presentment on the next business day after its issue and non-payment will not revive the drawer's liability.

BANKS AND BANKING — CHECKS — EFFECT OF CERTIFICATION BEFORE DELIVERY. — When the drawer of a check procures its certification by the bank before its delivery to the drawee, the drawer is liable upon non-payment on presentation to the bank.

BANKS AND BANKING — CHECK AS APPROPRIATION OF DEPOSIT. — The giving of a check by a bank depositor operates, at least after presentment, as an assignment to the holder of a sufficient amount of the deposit to pay the check, and is, therefore, a definite appropriation of that sum to its payment, binding upon all the parties to the check.

BANKS AND BANKING. — CHECKS — RIGHTS OF HOLDERS. — As between the parties to a check, the bank is the principal debtor to the payee or holder of a check drawn on funds on deposit, but the drawer is still liable, as surety at least, and is at liberty at any time, by paying and taking up his check, to reinvest himself with the legal title to the money on deposit.

Hamline, Scott, and Lord, for the appellant.

Runyan and Runyan, for the appellees.

BAILEY, J. This was a suit in *assumpsit* brought by the Metropolitan National Bank of Chicago against Noble Jones, Edward S. Jones, and Walter Metcalf, copartners doing business under the firm name of Noble Jones, to recover the amount of a bank check for \$1,540, drawn by the defendants on the Traders' Bank of Chicago, payable to the order of the plaintiff. The defendants pleaded *non assumpsit*, and on trial before the court, a jury being waived, the issues were found for the defendants, and the court, after denying the plaintiff's motion for a new trial, gave judgment in favor of the defendants for costs.

The facts appear by stipulation, and are, in substance, as follows: On the first day of October, 1888, after the commencement of banking hours in the morning of that day, the defendants being indebted to the plaintiff in the sum of \$1,540, gave

to the plaintiff their check on the Traders' Bank of Chicago, as follows: —

"EDW. S. JONES. NOBLE JONES. WALTER METCALF.

"\$1,540. CHICAGO, COOK CO., ILL., Oct. 1, 1888.

"Pay to the order of Metrop. Nat'l Bank fifteen hundred and forty dollars.

"NOBLE JONES.

"To Traders' Bank, Chicago, Ill. — No. 18,822."

On the same day and during banking hours, the plaintiff sent said check by one of its collectors to the Traders' Bank, and asked said bank to certify it, which was done by writing across the face of it as follows: "Certified. 10/1, 1888. Traders' Bank of Chicago. Charles G. Fox." The next morning, during banking hours, but before clearing-house hours, the plaintiff sent said check by its collector to the Traders' Bank and presented it for and demanded payment, which was refused. Thereupon, on the same day, and during banking hours, the plaintiff protested said check for non-payment, and sent notice of dishonor to the defendants. On the morning said check was presented for payment, and before it was presented, and before clearing-house hours, the Traders' Bank became insolvent and suspended payment, and its assets were subsequently placed in the hands of a receiver, who has since had possession thereof. Said receiver has paid the creditors of said bank dividends at different times, those paid to the plaintiff amounting to \$693, leaving a balance, principal and interest, due on said check at the time of the trial of \$961.70. At the time said check was drawn, at the time it was certified, and at the time payment was demanded, the defendants had sufficient funds in the Traders' Bank to their credit to pay the check, and if payment had been demanded instead of certification, said bank would have paid it.

Upon these facts, the counsel for the plaintiff submitted to the court the following proposition, to be held as the law in the decision of the case, which was refused: —

"The court holds, as a proposition of law, that when the holder of a check drawn upon a bank situated in the same city as the holder, on the day of its issue takes said check to said bank and asks said bank to certify said check, which said bank certifies by marking 'certified' on the face thereof, and the day following, during bank hours, presents said check to said bank for payment, and the bank refuses payment thereof, having become insolvent and passed into the hands

of a receiver before banking hours of said day, and the holder of said check at once, and during banking hours of said day, gives notice of such dishonor to the drawer of said check, said certification does not release the drawer of said check, although at the time of the making and certification of said check the drawer had sufficient funds to his credit in said bank to pay the same, as if payment had been demanded by the holder instead of certification, such bank could not have refused to pay the same."

The only question presented by this appeal is the one raised by the foregoing proposition, viz., whether the plaintiff, by obtaining certification of said check, released the drawers. A check being payable immediately and on demand, the holder can only present it for payment, and the bank can fulfill its duty to its depositor only by paying the amount demanded. In other words, the holder has no right to demand from the bank anything but payment of the check, and the bank has no right, as against the drawer, to do anything else but pay it. It follows that there is no such thing as acceptance of checks in the ordinary sense of the term, for acceptance ordinarily implies that the drawer requests the drawee to pay the amount at a future day, and the drawee "accepts" to do so, thereby becoming the principal debtor, and the drawer becoming his surety: Daniel on Negotiable Instruments, sec. 1601. If, then, the holder, on making presentment of the check, instead of demanding and receiving payment, has the check certified and retains it in his possession, he enters into a new and express contract with the bank not within the scope of the legal relations of the parties, nor within the presumed intention of the drawer. By certification, the bank enters into an absolute undertaking to pay the check when presented at any time within the period prescribed by the statute of limitations. The transaction, as between the holder and the bank, is substantially the same, in legal effect, as though the holder had received payment and had deposited the money with the bank and received a certificate of deposit therefor. The liability of the bank, after certification, is independent of the question of its possession of the requisite amount of funds of the drawer, it being, by the act of certification, estopped to deny the possession of sufficient funds.

Another result of the transaction is, that the bank thereby becomes entitled to, and if its business is properly conducted actually does, charge the amount of the check to the account

of the drawer at the time of the certification, thus in reality appropriating to the payment of the check the necessary amount of the money on deposit to the credit of the drawer, precisely the same as though the check were paid. As between the bank and drawer, certification has the same effect as payment, the funds representing the amount of the check being just as effectually withdrawn from the control of the drawer, and the indebtedness from the bank to the depositor, created by the deposit, being just as effectually satisfied to that amount, in one case as in the other.

The question whether this change in the rights and relations of the parties should be held to discharge the drawer from further liability on the check has not, so far as we are aware, ever been before this court for decision, but the great weight of authority, as found in the decisions of courts of other jurisdictions, and in the treatises of law-writers of the greatest learning and ability, is in favor of the conclusion that the drawer is discharged. Mr. Daniel, in the section of his treatise above cited, lays it down as the rule that the bank, by certifying the check, becomes the principal and only debtor; that the holder, by taking a certificate of the check from the bank, instead of requiring payment, discharges the drawer, and that the check then circulates as the representative of so much cash in bank payable on demand to the holder.

The question is very elaborately and learnedly discussed in 1 Morse on Banking, 3d ed., secs. 414 et seq., and the same conclusion reached, the following being a portion of the reasoning there adopted: "The drawer can no longer sue, though the bank should finally refuse to pay the check, for he has originally only a right to demand that the check shall be duly paid on presentment, and his action lies for the damage resulting to him or to his credit from not having his debt duly discharged in the manner he has led his creditor to suppose would be sufficient. But if the holder waives his right to immediate payment, by expressly asking for or even by accepting the offer of a certification by the bank, it follows that since his act acquits the debt due him from the drawer, the drawer can thereafter have no cause or basis whatsoever on which to sue. The matter is voluntarily taken out of his hands by the other parties, who make their arrangements to suit their own convenience. Even if the drawer has suggested or requested the arrangement, the assent of the payee and

holder must be regarded as at his sole risk. He is not obliged to take the bank's promise in place of the drawer's indebtedness. The promise of the bank on the drawer's account, accepted as satisfactory by the creditor, discharges the debtor, and at the same time deprives him of all further concern or possible right of action in the premises." See also Tiedeman on Commercial Paper, sec. 436.

This question was before the court of appeals of New York in *First National Bank of Jersey City v. Leach*, 52 N. Y. 350, 11 Am. Rep. 708, and it was there held that where a holder of a check presents it and procures it to be certified by the bank instead of being paid, such certification is, as between the holder and the drawer, a payment, and discharges the drawer from liability. In discussing the grounds upon which their decision is based, the court say: "When the drawee accepts, it is an appropriation of the funds, *pro tanto*, to the service and use of the payee or other person holding the bill, so that the amount ceases henceforth to be the money of the drawer, and becomes that of the payee or other holder in the hands of the acceptor. It is entirely clear that the acceptance of a time draft, before due, does not operate as a payment as respects the drawer. Its only effect is to make the acceptor the primary party to pay the draft. But the parties to a certified check, due when certified, occupy a different position. There the money is due and payable when the check is certified. The bank virtually says that the check is good; we have the money of . . . the drawer here ready to pay it. We will pay it now if you will receive it. The holder says no, I will not take the money; you may certify the check and retain the money for me until this check is presented. The law will not permit a check when due to be thus presented, and the money to be left with the bank for the accommodation of the holder, without discharging the drawer. The money being due and the check presented, it is his own fault if the holder declines to receive the pay, and for his own convenience has the money appropriated to that check, subject to its future presentment at any time within the statute of limitations." See also *Essex County National Bank v. Bank of Montreal*, 7 Biss. 193.

It seems to us very clear, both upon principle and authority, that the plaintiff in this case, by obtaining certification of their check, discharged the defendants from all liability thereon as drawers, and that the subsequent presentment of

the check for payment, though on the next business day after the check was issued, did not revive or in any manner affect the defendants' liability.

But it is said that a different rule was laid down by this court in *Bickford v. First National Bank of Chicago*, 42 Ill. 238; *Rounds v. Smith*, 42 Ill. 245; and *Brown v. Leckie*, 43 Ill. 497. It will be found, on examination, that in each of those cases certification of the check was obtained by the drawer before delivery to the payee, and that no presentment was made by the holder until made in due course for payment. It is easy to see that an essentially different rule should apply in a case of that kind. The fact that the drawer, before delivering the check, gets the bank to certify it, in no way changes its essential nature as a check, or affects the drawer's liability in case, on due presentation for payment, the paper is dishonored. The reasoning of the opinions in the above-mentioned cases should be restricted in its application to the facts appearing in those cases; and as applied to those facts, it is doubtless correct, and should be followed. But it cannot, and as we may assume was not intended to, apply to cases like the present, where the holder has himself made presentment of the check, and instead of receiving payment, as he might and should have done, has chosen rather to accept, in lieu of payment, an express executory agreement by the bank to pay the check to the holder when presented for payment at any time thereafter.

Much effort is made by counsel to show that, to be consistent with the doctrine established by the case of *Munn v. Burch*, 25 Ill. 35, and in the numerous cases in which that decision has been followed, we must hold that the defendants were not released from liability by the certification of the check. In *Munn v. Burch*, 25 Ill. 35, we held, contrary to the rule recognized in many of the states, that a depositor, by delivering to another his check on his banker for value, transfers to the payee of the check and his assigns, so much of the deposit as the check calls for, and that on presentation of the check for payment, the banker becomes liable to the holder for that amount, provided the drawer has on deposit at the time a sufficient sum applicable to that purpose to pay the check. Accordingly, if the banker refuses to pay the check on presentment, he becomes liable to an action by the holder to recover its amount. It follows that the giving of the check becomes, at least after presentment, an assignment

to the holder of a sufficient amount of the deposit to pay the check, and therefore a definite appropriation of that sum to its payment, binding upon all the parties to the check.

The argument sought to be made, if we understand it, is, that the certification of the check is a no more effectual appropriation of the fund on deposit to the payment of the check than was already made by the act of the drawer in giving the check; and therefore that one of the chief grounds upon which the rule adopted in other states, that certification releases the drawer, is based, fails or is inapplicable here. If the mere fact of such appropriation, however made, is the test by which to determine whether the drawer has been released or not, there may be force in the argument. We do not understand, however, that such is the case. Some of the authorities, it is true, allude to and dwell upon that circumstance as possessing very considerable significance, but we do not understand that any of them make it the test or basis of the rule.

The rule laid down in *Munn v. Burch*, 25 Ill. 35, is based upon the implied agreement on the part of the banker to pay out the money deposited to the holders of the depositor's checks, at such times and in such sums as the depositor sees fit, by his checks, to order, and such agreement is held to be so far available to the holder of the depositor's check as to enable him, after the check has been duly presented for payment and payment refused, to bring suit against the banker in his own name and recover the amount of the check. The banker, as the result of his implied agreement, becomes the principal debtor, but the drawer is still liable, at least as surety, and is at liberty at any time, by paying and taking up the check, to reinvest himself with the legal title to the money on deposit. The appropriation of the fund then, so far as any definite appropriation of it can, under the circumstances, be said to be made, is only conditional, and follows in strict accordance with the terms of the contract between the parties, and must be regarded as one of the consequences contemplated by them at the time the check was drawn.

But where the holder of the check, on presenting it to the banker, instead of demanding and receiving payment, as the parties contemplated, and as is his legal duty, requests and obtains certification, and retains the check in his own hands, wholly different rights are obtained, and consequently different rules of law are applicable. The appropriation of the deposit to the payment of the check then becomes absolute, and

the holder enters into new contractual relations with the banker, not contemplated or authorized by the drawer, and which place the fund appropriated wholly beyond his control and out of his reach.

Even viewing the drawer as a surety, the new contract between the creditor and the principal debtor, affecting as it does the character of the debt and the time and manner of payment, should of itself be held, upon well-settled principles of law, to be sufficient to discharge his liability as surety. But whether the decision of the case should be placed upon this ground or not, the presentment of the check for payment and its dishonor on the one hand, and its presentment and certification on the other, involve legal rights, and invoke the application of legal rules, so essentially different, that the doctrine of the case of *Munn v. Burch*, 25 Ill. 35, which is controlling where payment is demanded and refused, can have no relevancy to or controlling effect, even by analogy, in a case where the holder gets the check certified.

We are of the opinion that no error was committed in refusing to hold the proposition submitted by the plaintiff as the law in the decision of the case, and that the appellate court properly affirmed the judgment. The judgment of the appellate court will accordingly be affirmed.

BANKS AND BANKING — PAYMENT BY CERTIFIED CHECKS. — Bank certifying check as "good" creates a new and binding obligation, on the part of the bank towards a *bona fide* holder of the check for value, to hold sufficient funds of the drawer to meet check: *Farmers' etc. Bank v. Butchers' etc. Bank*, 69 N. Y. 125; 69 Am. Dec. 678. Where the holder of a check procures it to be certified, this operates as payment of the debt for which the check was drawn, and the drawer is released from liability: *French v. Irwin*, 4 Baxt. 401; 27 Am. Rep. 769; *First Nat. Bank v. Leach*, 52 N. Y. 350; 11 Am. Rep. 708; *Born v. First Nat. Bank*, 123 Ind. 78; 18 Am. St. Rep. 312.

BANKS AND BANKING — EFFECT OF CERTIFYING CHECK. — As to the liability of banks on checks certified by them, see notes to *Farmers' etc. Bank v. Butchers' etc. Bank*, 69 Am. Dec. 691-694; *Bickford v. First Nat. Bank*, 42 Ill. 238; 89 Am. Dec. 436, and extended note; *Clews v. Bank*, 42 Am. Rep. 308-311. A bank is liable on a certified check, whether the drawer had sufficient funds or not: *French v. Irwin*, 4 Baxt. 401; 27 Am. Rep. 769; *Farmers' etc. Bank v. Butchers' etc. Bank*, 16 N. Y. 125; 69 Am. Dec. 678; *Cook v. State Nat. Bank*, 52 N. Y. 96; 11 Am. Rep. 667; *Hill v. Nation Trust Co.*, 106 Pa. St. 1; 56 Am. Rep. 189. The certification is equivalent to a representation that the drawer has funds in the bank with which to pay the check, and that the bank will retain such funds, and pay the check at the bank designated: *Lynch v. First Nat. Bank*, 107 N. Y. 179; 1 Am. St. Rep. 803.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

HUTTS v. MARTIN.

[131 INDIANA, 1.]

APPELLATE PROCEDURE. — NOTICE TO co-parties is imperatively required by the statutes of Indiana.

APPELLATE PROCEDURE — MISTAKE, RELIEF FROM. — If the failure to serve notice of appeal upon co-parties is due to accident or mistake of fact, the appellate court may relieve against the mistake, and is not bound to dismiss the appeal.

L. J. Coppage and M. D. White, for the appellants.

H. H. Dochterman and D. Simms, for the appellee.

ELLIOTT, C. J. This action was instituted by John B. Martin against Mark O. Hutts, Henry P. Hutts, Milton Hutts, Joseph Hutts, Francis Hutts, Eliza Whittaker, and William Whittaker. The trial court found that all of the defendants were in possession of the land to which Martin asserted a right, and that they claimed title adversely to him. The court found and adjudged that Martin was entitled to the land, and to recover possession. William Whittaker is not made a party to the appeal, but in the assignment of errors Elizabeth Whittaker is named as an appellant. The appellee has filed a motion to dismiss the appeal, upon the ground that two of the defendants below, and co-parties of the appellants, are not made parties to the appeal.

The rule requiring notice to be given co-parties is not a technical one, but, on the contrary, is a rule of substance and importance. The presence of co-parties on appeal is essential to complete jurisdiction, so that the question of co-parties is one of a jurisdictional nature. Our statute concerning co-parties is explicit and mandatory, and neither the court nor the

parties can disregard it: Rev. Stats. 1881, sec. 635. Notice to co-parties is imperatively required: *Travelers Ins. Co. v. Yount*, 98 Ind. 454; *Concannon v. Noble*, 96 Ind. 326; *Shulties v. Keiser*, 95 Ind. 159; *Hunderlock v. Dundee etc. Co.*, 88 Ind. 139.

The common-law rule respecting parties was more strict than that prescribed by our code. It is, however, not always true that parties to the record or parties to the action upon the same side are co-parties, for there may be a complete severance of interest by the judgment below, or the parties to the action or record may not be parties to the judgment.

In this instance Eliza Whittaker and William Whittaker are co-parties of the appellants, for the action is to recover possession of land, and the trial court found and adjudged that all who were defendants were in possession of the land, asserting title adversely to the appellee, and among the defendants were William and Eliza Whittaker. As they were co-parties, the appellants should have given them notice as the law requires.

We have concluded that, although the appellants have not given their co-parties notice, the appeal ought not to be dismissed. This conclusion is asserted by us for the reason that the appellants have shown that the failure to make necessary parties was due to accident or to mistake of fact. The mistake as to Eliza Whittaker is simply in naming her Elizabeth Whittaker, and as to William Whittaker, the mistake is shown to have been caused by an error of the clerk of the trial court in making out the transcript. We think it clear that an appellate court has the inherent power to relieve against accident and excusable mistake in the proper case: *Smythe v. Boswell*, 117 Ind. 365. If it were not for the mistake, the motion to dismiss the appeal should be sustained, inasmuch as all parties must be brought in within the time limited for appealing, unless accident, fraud, or excusable mistake is affirmatively shown: *Holloran v. Midland Ry Co.*, 129 Ind. 274.

Ordered, that the motion to dismiss be overruled, that the costs of the motion be taxed against the appellants, and that they be allowed thirty days in which to correct their errors respecting parties.

APPEAL — MISTAKE IN NOTION OF APPEAL, whereby the judgment appealed from is described as entered on the day when the judgment was rendered, instead of the day when it was entered, does not entitle respondent to a dismissal of the appeal: *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34.

CULLY v. SHIRK.

[181 INDIANA, 76.]

JUDGMENT. — RELIEF FROM JUDGMENT, ON THE GROUND THAT THE SHERIFF'S RETURN OF SERVICE OF PROCESS IS FALSE, will not be granted in an action to set aside such judgment, when there is no pretense that the conduct of the officer or of the sheriff was fraudulent.

JUDGMENT — COLLATERAL ATTACK, WHAT IS. — The court intimates that, were the question necessarily involved, it would hold that every attack upon a judgment for want of jurisdiction in the court to render it, predicated on matters *dehors* the record, is a collateral attack.

J. T. France and J. T. Merryman, for the appellant.

P. B. Manley and E. E. Friedline, for the appellees.

MILLER, J. This action was brought by the appellant against the appellees to set aside, vacate, and declare null and void a judgment and decree of the Adams circuit court, rendered against her in an action to foreclose a mortgage, and to cancel a sheriff's deed executed in virtue of the judgment and decree.

The judgment is assailed upon the ground that the court was without jurisdiction of the person of the defendant. The complaint alleges that "she never had, at any time, any notice of any kind whatever of the filing of said complaint, or the pendency of said action; that the return of said sheriff on said summons, wherein he states that he left a true copy of said summons at the last and usual place of residence of this plaintiff, is wholly false; that no copy of summons or process of any kind, in relation to said cause, was ever left at the residence of this plaintiff, or served on her in any manner whatever; that she never appeared to said cause, in said court, voluntarily or otherwise, and never, in any manner submitted herself to its jurisdiction in said action."

This was not an application, under section 396 of the code, to be relieved from a judgment taken against her, through her mistake, inadvertence, surprise, or excusable neglect; but was simply a suit to have the judgment set aside, upon the ground that the return of the sheriff, showing that a summons had been served upon her, was untrue; that she never had been served with process, and that therefore the court was without jurisdiction of her person when the judgment was rendered.

There is no claim that the defendants in the action of fore-

closure had a meritorious defense, or that the proceedings were not proper and regular upon their face.

The appellees answered this complaint by a general denial. The cause was tried by the court, and, upon request, a special finding of the facts and conclusions of law were returned. The conclusion at which we have arrived, upon the effect to be given to the return of the sheriff, in this class of actions, renders it unnecessary to set out at length the finding of facts and conclusions of law.

The court found that the summons issued in the foreclosure suit was returned by the sheriff with this indorsement:—

“Came to hand this seventh day of April, 1888. Served as commanded by leaving a true copy of this writ at the last and usual place of residence of Elizabeth Cully, this eleventh day of April, 1888.

PERRY H. LAWTON.

“By J. S. McLEOD, Deputy.”

This return was regular upon its face, and was such as to fully authorize the court to assume jurisdiction of the person of the defendant. The proceedings of the court, subsequent to that time, appear to be regular. There is no pretense that there was any fraudulent conduct on the part of either the plaintiff or the officer in the service or return of the summons, or that the defendant was not a resident of the county.

Such being the case, we are of the opinion that the return by the sheriff of the service of the process was binding and conclusive upon the parties to the suit, and that neither of them can, as against the other, be permitted to dispute its verity.

In *Nieteri v. Trentman*, 104 Ind. 390, it was held, by a divided court, that in a proceeding under section 896 of the Revised Statutes of 1881, to set aside a default and be relieved from a judgment taken against a defendant who had a meritorious defense, but was prevented from appearing in time to make his defense by “his mistake, inadvertence, surprise, or excusable neglect,” the defendant might, for the sole purpose of showing a sufficient reason for not appearing and making defense, show that the summons was not, in fact, served upon him.

In the opinion overruling the petition for a rehearing, Zolars, J., said: “He cannot dispute the service for the purpose of assailing the judgment as void, nor of disputing the jurisdiction of the court over him; he cannot do this by reason of

the rule invoked by appellees. That rule says that for the purpose of jurisdiction the return of service by the officer is conclusive, although, in fact, there may have been no service."

This case is not within the exceptions to the general rule, that the return of a sheriff is conclusive between the parties, as declared in that case, and we certainly do not desire to go any farther in that direction.

The appellant cites and relies upon the case of *Dobbins v. McNamara*, 118 Ind. 54; 3 Am. St. Rep. 626. In that case the complaint alleged that the defendant was not a resident of the county where he was returned as served by copy left at his last and usual place of residence; that he never made his home, or even staid over-night, at the house where the copy was left, and it also alleged that he was not at that time within the jurisdiction of the court in which the action was pending. In connection with these allegations, it was averred that the pretended service and return to the summons was procured by the fraud of the attorney of the plaintiff.

The distinction between the cases is marked and important. The elements of fraud and the non-residence of the defendant, lacking in this case, were in that case controlling. A similar case is that of *Cavanaugh v. Smith*, 84 Ind. 380.

We have considered this case upon the ground assumed by the parties, that the attack upon the judgment was direct, and not collateral. The converse of this rule seems to be established by the later cases, and the general rule is laid down that any attack upon a judgment for want of jurisdiction in the court to render it, predicated upon a matter *dehors* the record, is collateral: *Harman v. Moore*, 112 Ind. 221; *Cain v. Goda*, 84 Ind. 209; *Lantz v. Maffett*, 102 Ind. 23; *Earle v. Earle*, 91 Ind. 27; *Indianapolis etc. R'y v. Harmless*, 124 Ind. 25.

Judgment affirmed.

JUDGMENT. — **IMPEACHMENT OF SHERIFF'S RETURN**, in what cases allowed: See note to *Morrill v. Morrill*, 23 Am. St. Rep. 117. The authorities are conflicting as to the conclusiveness of a sheriff's return. As to what is a collateral attack, see note to case just cited, p. 104; and *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448, and note.

PATOKA TOWNSHIP v. HOPKINS.

[131 INDIANA, 142.]

SURFACE WATERS. — IT IS NOT TRUE THAT A LAND-OWNER OR A MUNICIPAL CORPORATION may lawfully collect surface water into an artificial channel and pour it on another's land.

SURFACE WATERS. — IF A PUBLIC CORPORATION by its acts makes necessary an outlet for the escape of water collected by it into artificial water-ways, it must provide that outlet. Otherwise it is guilty of an actionable wrong.

HIGHWAYS — SURFACE WATERS FROM. — If surface waters are collected in ditches at the sides of a public highway, and those ditches are then united and their waters thrown on the land of a private proprietor, rendering it wet and untillable, he is entitled to maintain an action against the township under whose authority the injury was inflicted, to enjoin its continuance.

PLEADING. — COMPLAINT WILL NOT BE HELD BAD because the facts stated do not entitle the plaintiff to all the relief prayed for.

APPELLATE PROCEDURE. — AN APPELLEE MAY, IN INDIANA, properly save a question and duly present it by the assignment of cross-errors, and when he does so, he may, in many instances, accomplish as much as if he had himself prosecuted the appeal.

HIGHWAY. — A COURT CANNOT DIRECT HOW AND WHEN DRAINS shall be constructed by highway officers.

M. W. Fields and J. W. Ewing, for the appellants.

L. C. Embree and W. P. Howe, for appellee.

ELLIOTT, C. J. The complaint of the appellee is for an injunction and the abatement of a nuisance. The complaint alleges that the appellee owns eighty acres of land, lying along a public road, under the control of Patoka township; that the natural surface of the land is such that the surface water which collects south of the road flows south over the appellee's land, and the water which collects on the north side of the road flows north and away from his land; that prior to the first day of May, 1889, the township had cut two artificial ditches, one on each side of the road; that on the day named the township constructed a culvert across the road, so that the water in the north ditch poured into the south ditch; that neither of the ditches constructed by the township is a natural watercourse; that along the north line of the road the property owners had constructed high embankments, and thus prevented the water from flowing upon their land, and caused it to be confined in the north ditch; and that a great quantity of water collects in the ditch north of the road; that by uniting the two ditches the water was thrown upon the appellee's land, rendering it wet and untillable.

The case has been ably argued, and the questions well presented. The questions are important, and not free from difficulty.

Surface water, it has been said, is a common enemy, which the land owner may fight off his land, as best he may. But while there is something of truth in the statement, there is, nevertheless, much of error. It is not true, in law, that a land-owner or a municipal corporation may collect surface water in an artificial channel and pour it upon another's land. Whatever doubt may have once existed upon this subject, none longer exists. It is now well settled that the right to fight off surface water does not authorize it to be collected in a volume and cast upon the land of another: *Davis v. City of Crawfordsville*, 119 Ind. 1, 12 Am. St. Rep. 561, and cases cited; Gould on Waters, 2d ed., sec. 271. A public corporation has no more right to collect water in an artificial channel, and cause it to flow upon the land of another, in a greatly increased quantity, than has a private land-owner. This is established law. It is clear, therefore, that if the township authorities did collect the surface water in an artificial channel, and thus cause it to flow upon the appellee's land, his rights of property have been invaded, and an action will lie. Another settled principle of law is here influential. That principle is this: If a public corporation, by its acts, makes necessary an outlet for the escape of water collected by it in artificial water-ways, that outlet it must provide. If it fails to provide the outlet made necessary by its own act, it is guilty of an actionable wrong: *City of Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86, and cases cited; Gould on Waters, 2d ed., p. 517, sec. 261. See also authorities cited in Elliott on Roads and Streets, 363. In this instance the public corporation united two ditches, and thus conveyed upon the appellee's land, by artificial water-ways, a great volume of water, that naturally flowed in a different direction, and this they did without providing an outlet. They were, therefore, the authors of a positive wrong.

The case before us does not fall within the rule that a public corporation is not liable for consequential injuries resulting from the improvement of a highway in a careful and skillful mode. Here the corporation constructed artificial ditches, and gathered the water in one volume; here it united two artificial water-ways; and here it changed the natural flow of the water. This was done in view of the fact

that the consequences of the union of the two ditches would necessarily cast an increased volume of water upon the appellee's land, for the surroundings were such, as the complaint shows, as rendered this result inevitable.

The rule declared in the case of *City of North Vernon v. Voegler*, 103 Ind. 314, does not govern this case. The reason for this conclusion is evident. In the case referred to there was simply negligence in constructing a culvert at a place where there was authority to construct it; while here there was no right to so construct a culvert as to unite two artificial channels, change the natural flow of water, and cast upon the appellee's land in an increased volume. There is here more than the negligent construction of a culvert; more than negligence in devising a plan, for there is a positive wrong, inasmuch as the natural flow of water is changed, and thrown upon the appellee's land in a greatly increased volume.

It is assumed that the township officers had authority to construct the culvert, and it is asserted as a conclusion from the premise assumed, that they cannot be enjoined from doing what they have lawful authority to do. In support of this position, we are referred to the cases of *City of Kokomo v. Mahan*, 100 Ind. 242; *Mayor etc. v. Roberts*, 34 Ind. 471; *Wilson v. Mayor etc.*, 1 Denio, 595; 43 Am. Dec. 719; and *McOsker v. Burrell*, 55 Ind. 425.

The assumption is not valid, and with it falls the conclusion founded upon it. The assumption is not sustained by the authorities cited, nor has it any foundation in principle. This is obvious from what we have said, for the assumption cannot stand against the settled principle that water cannot be collected in artificial channels, the natural flow changed, the volume increased, and no outlet provided. It is one thing to grade a highway, and cast off surface water as a consequence of the grading, and quite another thing to change the natural flow, unite artificial channels, increase the volume of water, and cause it to flow upon private property in an increased volume. It is not the mere fact of constructing the culvert across the highway that constitutes the actionable invasion of the plaintiff's right of property, for the acts of the public corporation extend far beyond the mere construction of the culvert. The corporation may construct culverts, but it cannot destroy private property by uniting in one artificial channel a great body of water, changing the natural flow, and throwing the collected water upon the citizen's land.

We fully agree with appellants' counsel that a complaint must proceed upon a definite theory, and be sufficient upon the theory adopted, but we cannot agree that the rule stated condemns the appellee's complaint. The theory of the complaint is, that the appellee is entitled to an injunction, and to that theory the facts stated are fitted. It is true that the complaint characterizes the culvert as a nuisance, and it may possibly be true that it is not a nuisance (a question it is not necessary to decide); but granting that it is not, still the facts stated show a right to the relief prayed, and sustain the general theory of the pleading. Against facts, epithets are of little force, and here there are substantive facts showing a clear right and its wrongful invasion. It may be true that the appellee is not entitled to all the relief prayed, but if it were conceded that he is not, it would not warrant the conclusion that the complaint is bad, for the law is, that if the complaint shows the plaintiff entitled to a part of the relief demanded it will repel a demurrer: *Bayless v. Glenn*, 72 Ind. 5.

We cannot disturb the finding upon the evidence.

The appellee has assigned as cross-error the refusal of the court to embody in the decree an order abating the culvert as a nuisance. As the court awarded an injunction against the maintenance of the culvert, we cannot perceive that the appellee was harmed by the refusal of the court to modify the decree in the particular indicated.

The appellee also asked the court to modify the decree by striking out one of its provisions. The motion and the part of the decree objected to are properly brought into the record by a bill of exceptions, so that it is our duty to decide the question presented. It is a mistake to suppose that an appellee who properly saves a question, and duly presents it by the assignment of cross-errors, is not entitled to affirmative relief. An appellee may do more than save costs or prevent a reversal by appropriately assigning cross-errors. He may in many instances accomplish as much by the assignment of cross-errors in a case appealed by his adversary as by himself prosecuting an appeal: *Johnson v. Culver*, 116 Ind. 278; *Feder v. Field*, 117 Ind. 386; *Shinkle v. First Nat. Bank*, 22 Ohio St. 516; *Collins v. Davis*, 32 Ohio St. 76.

The part of the decree which we deem subject to the objections urged by the appellee is that indicated in the first

specification of the appellee's motion to modify. That part should be eliminated. The part of the decree indicated assumes to declare what the township officers shall do in the way of constructing drains for the highway. We regard it as quite clear that the court cannot direct how or when drains shall be constructed by highway officers, inasmuch as the control of that matter is committed to those officers, and not to the courts: *Weaver v. Templin*, 113 Ind. 298, and cases cited; *City of Fort Wayne v. Cody*, 43 Ind. 197, and cases cited. We should hold that the error in directing the highway officers where and how to construct the drains was one of which the appellee could not successfully complain if it were not for the fact that the order provides that they shall be constructed, in part, at least, on his land. As all the parts of the decree affecting this particular matter are inseparably blended, the whole clause must be struck out, and the decree be so remodeled as to award an unconditional injunction.

The judgment is reversed upon the appellee's assignment of cross-errors, and affirmed upon the appellants' assignment of errors. The trial court is instructed to modify the decree as herein indicated, and to proceed in accordance with this opinion.

SURFACE WATERS, RIGHTS OF ADJACENT LAND-OWNERS AS TO. — Owner of higher land has no right to collect surface water and discharge it on the land of another, and if he does so, he will be liable for the damage sustained: *Rychlicki v. City of St. Louis*, 98 Mo. 497; 14 Am. St. Rep. 651; *Fremont etc. R. R. Co. v. Marley*, 25 Neb. 138; 13 Am. St. Rep. 482; *Illinois Central R. R. Co. v. Miller*, 68 Miss. 760; *Beach v. Gaylord*, 43 Minn. 476 (a case in which the water was collected into gutters from a house roof, and discharged then by a pipe). As regards the drainage or diversion of surface water, a railroad company enjoys the same (but no greater) privileges as any other land-owner: *Jenkins v. Wilmington etc. R'y Co.*, 110 N. C. 438. To prevent the wrongful diversion of surface water, injunction is the proper remedy: *Dayton v. Drainage Comm'rs*, 128 Ill. 271.

SURFACE WATERS, LIABILITY OF MUNICIPAL CORPORATIONS FOR DIVERSION OF. — This subject was discussed in the note to *Goddard v. Harpswell*, 30 Am. St. Rep. 390, and the cases in the series supporting the generally admitted principle, that no responsibility attaches where the diversion is merely incidental to and occasioned by the making or alteration of street grades, collected. *Miller v. Morristown*, 47 N. J. Eq. 62, is another recent authority for the same view. On the other hand, a municipal corporation is liable for collecting surface water by artificial means, and casting it upon the premises of another, in increased and injurious quantities. See extended note to *Chalkley v. Richmond*, 29 Am. St. Rep. 742, 743; *Field v. West Orange Tp.*, 46 N. J. Eq. 183; *Hans v. Borough of Bethlehem*, 134 Pa. St. 12.

PLEADING. — The demand in the complaint is no part of the cause of action, and does not give it character. The facts alleged do this, and plaintiff is entitled to such relief as they warrant; *Strain v. Babb*, 30 S. C. 342; 14 Am. St. Rep. 905.

HARRISON v. BISHOP.

[181 INDIANA, 151.]

WILLS MADE BY PERSONS UNDER GUARDIANSHIP. — One who has been adjudged to be of unsound mind and placed under guardianship is not necessarily incompetent to make a will, though such adjudication has never been set aside.

WILLS — CAPACITY TO MAKE. — One's mental powers may be so far impaired as to incapacitate him from the active conduct of his estate, and to justify the appointment of a guardian for that purpose, and yet have such capacity as will enable him to direct a just and fair disposition of his property by will.

WILLS — BURDEN OF PROOF. — If a TESTATOR, AFTER BEING ADJUDGED MENTALLY UNSOUND and placed under guardianship, executes a will, the burden is upon those who seek to uphold it to show by clear and satisfactory evidence that at the time of its execution he had the requisite degree of mental capacity.

R. N. Lamb and R. Hill, for the appellants.

J. S. Duncan and C. W. Smith, for the appellees.

McBRIDE, J. Counsel agree that the only question involved in this case is, "Whether a person who has been adjudged to be a person of unsound mind, at any time, and for whom a guardian has been appointed, and as to whom such adjudication of mental unsoundness has never been set aside in the manner provided by statute, can, while such adjudication and guardianship exist, make a valid will devising real estate."

In view of this agreement, a very brief statement of the facts will suffice.

In the year 1868, Thomas Harrison was, by the common pleas court of Marion County, duly adjudged of unsound mind, and incapable of managing his estate. Thereupon the court appointed a guardian of his person and estate, who duly qualified and entered upon the discharge of the duties of his trust. Harrison was never thereafter in any proceeding had adjudged to have regained soundness of mind, and continued under guardianship up to the time of his death, March 21, 1888. While thus under guardianship, he executed a paper

purporting to be his last will and testament. He died in Marion County, March 17, 1890, and the will was offered for and admitted to probate in the office of the clerk of the Marion circuit court, and an administrator with will annexed was duly qualified as such, and is engaged in discharging the duties of his trust. If the will is valid, its effect is to devise certain real estate in Marion County.

The question thus presented was considered, and at least inferentially decided, in the case of *Stevens v. Stevens*, 127 Ind. 560. We see no reason to change our opinion as indicated in that case. However, the question as now presented to us requires an express adjudication of the question, and it is therefore proper, and perhaps necessary, that we briefly review the ground.

Section 2556 of the Revised Statutes of 1881 provides that "all persons, except infants and persons of unsound mind, may devise, by last will and testament, any interest, descendible to their heirs, which they may have in any land," etc.

Section 2544 of the Revised Statutes of 1881 provides that "the words 'persons of unsound mind,' as used in this act, or any other statute of this state, shall be taken to mean any idiot, *non compos*, lunatic, monomaniac, or distracted person."

Section 2545 of the Revised Statutes of 1881, and the several sections immediately following, provide for the appointment of a guardian for a person who is of "unsound mind, and incapable of managing his own estate."

The guardian thus appointed has the custody both of the person and of the estate of his ward.

The guardianship terminates with the restoration to reason or the death of the ward: Rev. Stats. 1881, sec. 2552.

Provision is made for trying the question of restoration to reason of such person: Rev. Stats. 1881, sec. 2553.

Section 2554 of the Revised Statutes of 1881 provides that "every contract, sale, or conveyance of any person while of unsound mind shall be void."

The contention of the appellee is substantially as follows: That after one has been adjudged of unsound mind, and incapable of managing his estate, and placed under guardianship, there is an absolute incapacity on his part to contract, or in any other manner to transact any business relating to the management of his estate; that the adjudication in such case is conclusive as to his entire want of capacity in that respect; that his *status* is thereby not only definitely fixed, but

that it thereafter continues unchanged during the existence of the guardianship; that although he may, in fact, recover his reason, until that fact has been formally and judicially determined, his entire disability continues; that a person of unsound mind cannot make a valid will, and that a will is a form of conveyance, and therefore embraced within the terms of section 2554 of the Revised Statutes of 1881, and void also for that reason.

Assuming that the appellee is entirely right in so far as relates to the disability of one of unsound mind, under guardianship, to transact any business whatever relating to the management of his estate, does it necessarily follow that he may not have both the power and the requisite capacity to make a valid testamentary disposition of it? Does the adjudication as to his capacity to manage his estate necessarily involve an adjudication that he has not the capacity to dispose of it by will?

The right to make testamentary disposition of property, while, perhaps, uniformly regulated by statute, is by no means created by statute, but is a right common to civilized people in all ages. Our statute, therefore, while regulating the manner of exercising that right, cannot be said to confer it. No statute in this state, in terms, deprives those of unsound mind of the right to make a will. Nevertheless, a person of unsound mind cannot make a valid will. The disability, while not directly declared, is a legitimate and necessary inference from the language of the statute, which declares that all persons, except infants and persons of unsound mind, may make wills. The intention of the legislature to deny that right to those of unsound mind is plain. The disability thus inferentially declared does not depend upon or arise out of an adjudication of mental unsoundness, but rests upon the fact of mental unsoundness, regardless of any adjudication whatever upon the subject. One in fact of unsound mind cannot make a valid will, whether he has ever been so adjudged or not.

The law, however, recognizes degrees of mental unsoundness. Not every degree of mental unsoundness is sufficient to destroy testamentary capacity: *Lowder v. Lowder*, 58 Ind. 538; *Burkhart v. Gladish*, 123 Ind. 337.

What degree of mental capacity will suffice to empower one to make a valid will has been frequently considered by the courts. In *Lowder v. Lowder*, 58 Ind. 538, this court approved an instruction to the jury in the following terms: "In

legal contemplation, one who has sufficient mind to know and understand the business in which he is engaged, who has sufficient mental capacity to enable him to know and understand the extent of his estate, the persons who would naturally be supposed to be the objects of his bounty, and who could keep these in his mind long enough to, and could, form a rational judgment in relation to them, is a person of sound mind." This is quoted with approval in *Burkhart v. Gladish*, 123 Ind. 337, and also in *Durham v. Smith*, 120 Ind. 463, where the court said: "It is evident that a person might be possessed of the requisite capacity to make a will, as held in *Lowder v. Lowder*, 58 Ind. 538, and yet have some defect of the mind," etc. Many other authorities might be cited to the same effect. It is too plain for controversy that one might possess mental capacity quite up to or beyond the standard thus established, and yet fall far short of that necessary to enable him to transact business or manage his estate.

In our opinion, therefore, one's mental powers may be so far impaired as to incapacitate him for the active conduct of his estate, justifying the appointment of a guardian for that purpose, and yet he may have such capacity as will enable him to direct a just and fair disposition of his property by will.

The adjudication of mental unsoundness in proceedings for the appointment of a guardian for a person, while it conclusively establishes the fact of his inability to manage his estate, does not necessarily establish the existence of such unsoundness as would incapacitate him from making a valid will.

It is, however, *prima facie* evidence of such want of mental power, and when the validity of a will is properly in question, if it is shown to have been executed by one under guardianship, the burden is upon those who seek to uphold it to show by clear, explicit, and satisfactory evidence that at the time it was executed, the maker had the requisite degree of mental capacity: *Stevens v. Stevens*, 127 Ind. 560, and cases there cited. See also *Will of Slinger*, 72 Wis. 22; *Wadsworth v. Sharpsteen*, 8 N. Y. 388; 59 Am. Dec. 499; *Leonard v. Leonard*, 14 Pick. 280, 284; *In re Pendleton's Will*, 5 N. Y. Supp. 284.

The circuit court having reached a contrary conclusion erred, and the judgment is reversed, at the costs of the appellees.

WILLS — TESTAMENTARY CAPACITY. — A man may make a will, although at the time of executing it he was incapable of transacting business generally: *Kinns v. Kinns*, 9 Conn. 102; 21 Am. Dec. 732; *Terry v. Buffington*, 11 Ga. 337; 56 Am. Dec. 423; *St. Leger's Appeal*, 34 Conn. 434; 91 Am. Dec. 735; *Kerr v. Lunsford*, 31 W. Va. 661; or incapable to make a contract or manage his estate: *Potts v. House*, 6 Ga. 324; 50 Am. Dec. 329; *Conover v. Conover*, 21 Vt. 168; 52 Am. Dec. 53.

WILSON v. LOGUE.

[181 INDIANA, 191.]

HUSBAND AND WIFE — HUSBAND'S DEBT. — A mortgage and note executed by a husband and wife to secure the payment of a loan made to him cannot be enforced against her under the statutes of Indiana, when the property embraced in the mortgage is held by them as tenants by the entirety.

MECHANIC'S LIEN UPON LAND HELD BY HUSBAND AND WIFE AS TENANTS BY THE ENTIRETIES may be enforced as against her, if based upon a just claim for materials used in constructing a barn on the premises, when she knew of the intention of her husband to construct the barn and purchase materials therefor, and made no objection thereto.

MECHANIC'S LIEN THE NOTICE OF WHICH IS RECORDED IN THE WRONG BOOK is not invalid on that account.

J. W. Conoway and T. D. Evans, for the appellants.

L. H. Stanford, for the appellees.

COFFEY, J. This was an action in the Union circuit court, by the appellant George Wilson, to recover a personal judgment against the appellees upon a promissory note executed by them to him in the year 1886, and to foreclose a mortgage executed upon the real estate therein described to secure the payment of the note. The appellant Bond was made a party defendant because he claimed to hold a mechanic's lien upon the property.

The appellees answered that they were husband and wife, and held the land described in the mortgage by entirety; that the note in suit represented the individual debt of the husband, and that the wife was only the surety thereon, and that the mortgage in suit was executed to secure the individual debt of the husband.

They also filed a cross-complaint setting up the same facts, and praying that the mortgage might be canceled and their title quieted.

The appellant Bond filed a cross-complaint, in which he set

up a material-man's lien for material furnished for the construction of a building on the mortgaged premises.

Upon issues joined, the cause was tried by the court, and at the request of the appellants, a special finding of facts, with the court's conclusions of law thereon, was filed.

The court found specially that the debt evidenced by the note in suit was the separate debt of the husband, and that the wife was only surety; that the land described in the mortgage was held by the appellees by entirety, and that no part of the debt secured by the mortgage is the debt of the wife. The court further found that the debt for which the appellant Bond sought a material-man's lien was the separate debt of the husband, and that the notice of such lien had never been recorded in the miscellaneous records of Union County, as required by law.

The principal question discussed by counsel for the appellant Wilson, in his brief, relates to the sufficiency of the evidence to sustain the special finding of the court.

The evidence on the part of the appellees tends to show that the note in suit was executed to secure a loan made by the appellant to the husband. The money was intended and was in fact used by the husband to pay his individual debts. That the money was borrowed for the use of the husband the appellant knew at the time he made the loan. It is true that there is evidence on behalf of the appellant tending to show that some of the money was paid over to the wife, but this was denied by the appellees. The weight of the testimony was for the circuit court. We cannot undertake to weigh conflicting evidence.

This being the husband's debt, and the wife having signed the note and mortgage as surety only, the mortgage was void, and the court did not err in its conclusions of law upon the facts stated in the special finding: *Dodge v. Kinsy*, 101 Ind. 102; *Stewart v. Babbs*, 120 Ind. 588; *Crooks v. Kennett*, 111 Ind. 847; *State v. Kennett*, 114 Ind. 160; *Security Co. v. Arbuckle*, 119 Ind. 69; *McCormick et al. Co. v. Scovell*, 111 Ind. 551; *Long v. Crosson*, 119 Ind. 8.

In the trial of the issue between the appellant Bond and the appellees, it was proven that the barn on the premises, described in the mortgage, was destroyed by fire, by reason of which it became necessary to construct a new one. For this purpose the husband purchased the material from Bond, and used it in replacing the one destroyed. Within the time

fixed by statute, Bond filed with the recorder of Union County notice of his intention to hold a lien for such material. The husband, prior to purchasing the material, informed his wife of his intention to construct the barn, and she made no objections thereto. She was also present when the material was delivered and used in the construction of the building, and made no objection.

Under these facts, we think she should not receive the aid of a court of equity to remove the lien for material used in the betterment of the property. It would be inequitable to permit her to receive and retain the full benefit of material used in the construction of a barn upon her property, under the circumstances here disclosed, and refuse to pay for it. As she was fully informed as to the facts and made no objection, she should be held as assenting to the use of the appellant's material for her benefit, and bound to pay for the same: *Dalton v. Tendolph*, 87 Ind. 490.

The appellant Bond acquired a lien upon the property by filing notice of his intention to hold a lien with the recorder of Union County. It is true, the recorder recorded the notice in the wrong book, but this is not a defect which cannot be cured: *Wilson v. Hopkins*, 51 Ind. 231.

In our opinion, the circuit court erred in overruling the motion of the appellant Bond for a new trial.

Judgment affirmed as to Wilson, and reversed as to Bond, with directions to grant a new trial as to him.

HUSBAND AND WIFE — ESTATE BY ENTIRETIES. — The incidents of this estate are discussed in the extended note to *Den v. Hardenbergh*, 18 Am. Dec. 377-389. Later cases in the series are collected in the note to *Bennett v. Child*, 88 Am. Dec. 695. See also *Appeal of Lewis*, 85 Mich. 340; 24 Am. St. Rep. 94.

MECHANIC'S LIEN, RECORD OF. — Where a statute requires notice of a mechanic's lien to be filed and recorded in a book to be kept for that purpose by the county clerk, the fact that the book in which it is recorded has been used to record bills of sale does not affect the validity of the record of the lien, if in fact the book was the one kept for the purpose of recording all mechanics' liens: *Lyon v. Logan*, 68 Tex. 521; 2 Am. St. Rep. 511.

RICHARDSON v. COLEMAN.

[131 INDIANA, 210.]

JURY TRIAL — COMPROMISE VERDICT — INSTRUCTION TO JURY CONCERNING.

—To charge a jury, that "the law which requires unanimity on the part of a jury to render a verdict expects and will tolerate reasonable compromise and fair concession," is erroneous. While the law permits each juror to give due consideration to the arguments of his fellow-jurors, it does not expect nor tolerate his agreeing upon a verdict unless he is convinced that it is right.

P. S. Kennedy, S. Kennedy, and H. J. Milligan, for the appellant.

S. J. Peelle and W. L. Taylor, for the appellee.

OLDS, J. This was an action by the appellant against the appellee for damages received by the appellant while working in the heading factory of the appellee, alleged to have resulted by the negligent use of a belt, and from weak and insecure fastenings with which the same was put together.

, There was a trial by jury, and the jury was instructed and retired to deliberate. Afterwards the court called the jury into court, and gave them instruction numbered 8, in the giving of which it is contended by the appellant that the court erred.

The evidence is not in the record, but all of the instructions are in the record, as provided by section 535 of the Revised Statutes of 1881.

It is suggested by counsel for appellee that the question must be presented as provided by section 630 of the Revised Statutes of 1881, for the presentation of reserved questions of law, but in this counsel are in error. There is no attempt to bring the case to this court under section 630 of the Revised Statutes of 1881, and it was not necessary that it should be brought under the provisions of that section.

There was a verdict returned, a motion for a new trial filed and overruled, exceptions were reserved to the ruling and judgment rendered. The case is appealed in the ordinary way, but the record does not contain the evidence.

If the instruction complained of was competent under any phase of the evidence which might have been introduced, then the judgment must be affirmed, but the particular instruction complained of has no relation to the evidence; hence it would have only encumbered the record to have included it. The instruction reads as follows:—

"Eighth. In addition to the instruction which I have heretofore given you, I now desire to say that you are to take the law as given you by the court, and not to be swayed by any speculations of your own as to what the law is or ought to be. You are, however, the judges of the credibility of the witnesses, and should weigh and consider the evidence as I have heretofore indicated. It is important to the parties to have this case decided. You will, I trust, in your deliberations, be careful to avoid the influences of undue pride of personal opinion. The law which requires unanimity on the part of the jury to render a verdict expects and will tolerate reasonable compromise and concessions. You will remember, gentlemen, that absolute certainty is not always attainable in human affairs, neither does the law require it. Whilst it is expected that there will be individual opinion, judgment, and conscience, it is also expected that it will not go to the extent of unreasonable obstinacy. You will return to your room and again confer together, calmly and deliberately reviewing the case under the instructions I have given you."

The main portion of this instruction we do not deem objectionable. As to the propriety of having the jury brought into court after they had deliberated for nearly twenty-four hours and giving the instruction, we need not speak, and there is only a portion of the instruction that we deem it necessary to consider.

By one clause of the instruction the jury are told that "the law which requires unanimity on the part of the jury to render a verdict expects and will tolerate reasonable compromise and fair concessions." We cannot give our sanction to this statement of the law. By it the jury are told that the law "expects and tolerates reasonable compromise." The law does not expect any compromise on the part of jurors. It expects every juror to exercise his individual judgment, and that when a verdict is agreed to it will be the verdict of each individual juror. In arriving at a verdict, a juror should not indulge in any undue pride of personal opinion, and he should not be unreasonable or obstinate, and he should give due consideration to the views and opinions of other jurors, and listen to their arguments with a willingness to be convinced, and to yield to their views if induced to believe they are correct; but the law does not expect, nor does it tolerate, the agreement by a juror upon a verdict unless he is convinced that it is right; in other words, unless it is his verdict,—a verdict which his

conscience approves, and he, under his oath, after a full consideration, believes to be right. To say that jurors may compromise upon a verdict is to say that twelve jurors, all differing widely in their views as to what verdict ought to be returned, without any of them changing their views, may agree upon a verdict which is not believed to be right by any considerable number of the jurors, but agreed to as a matter of expediency in order to dispose of the case without the approval of the consciences of any considerable number of the panel approving of it.

The instruction tells the jurors the law expects them to make concessions and compromises, and agree upon a verdict which their consciences do not approve, but they should do so as a matter of expediency in order to dispose of the case.

The opinion in the case of *Clem v. State*, 42 Ind. 420, 18 Am. Rep. 369, sustains the views we have expressed. It is true that decision was rendered in a criminal case, but a verdict, whether in a civil or criminal case, must be the verdict of all the jurors: Thompson on Trials, sec. 2803.

In the case of *Houk v. Allen*, 128 Ind. 568, after the jury had been out some twelve hours, the jurors agreed that a certain number of ballots be cast and counted, and if either the plaintiff or the defendant received a majority of the ballots so cast, that the verdict should be returned for the party receiving a majority; and the agreement was carried out, and a verdict returned in accordance with the agreement. This court held that a verdict could not be arrived at in that way, and in the opinion it is said: "It is very clear, we think, that the rights of the parties were not determined according to the judgment or consciences of the members of the jury, as was their right, but that the verdict was the mere creature of the agreement to which jurors bound themselves in advance of the verdict." And yet this method of arriving at a verdict was but a compromise, the result of a concession made by the jurors; they could not agree upon a verdict; they differed as to whether the verdict should be for the plaintiff or the defendant, and after having deliberated for twelve hours, they compromise upon a verdict, and agree that it shall be reached in a certain way, and in doing so they return a verdict which is not approved by the judgment and conscience of the minority of the jurors, and the court says it is illegal.

Under the instructions given in this case, the jury may

have entered into a like agreement, and compromised upon a verdict to be arrived at in like manner.

In the case of *Goodsell v. Seeley*, 46 Mich. 623, 41 Am. Rep. 183, the court, in speaking of jurors compromising, says: "The law contemplates that they shall, by their discussions, harmonize their views if possible, but not that they shall compromise, divide, and yield for the mere purpose of an agreement": *Randolph v. Lampkin*, 90 Ky. 551.

We have examined the authorities cited by counsel for appellee, and they do not sustain the instruction, and we have found none that do.

The other part of the instruction, other than that which we have commented upon, while not erroneous in itself, yet when taken together with the part that is erroneous, tended to add stress to the words "expect and tolerate reasonable compromise and fair concessions"; and we think the instruction would fairly lead the jurors to believe that, having deliberated twenty-four hours, and being unable to agree, they had the right to compromise upon a verdict, and return it, although it did not meet the approval of the consciences of the individual jurors. This instruction was not proper under any state of the evidence, and the judgment must be reversed.

Judgment reversed, at costs of the appellee.

JURY TRIAL. — COMPROMISE VERDICT will not be allowed to stand, especially if arrived at in disregard of the charge of the court and the evidence given: *Morley v. Liverpool etc. Ins. Co.*, 85 Mich. 210; *Randolph v. Lampkin*, 90 Ky. 551; nor a verdict arrived at by balloting and accepting the decision of the majority: *Hout v. Allen*, 126 Ind. 568. So it was held that the amount of damages cannot be assessed by adding together the several sums suggested by each juror, and dividing the aggregate by the number of jurors: *Sawyer v. Hannibal etc. R. R. Co.*, 37 Mo. 240; 90 Am. Dec. 382; *Milledge v. Todd*, 1 Humph. 43; 34 Am. Dec. 615; *Wilson v. Berryman*, 5 Cal. 44; 63 Am. Dec. 78; *Allard v. Smith*, 2 Met. (Ky.) 297. Nor will a jury, which is unable to agree, be permitted to leave the case to a part of their number, and return a verdict according to the decision of such part: *Ayreson v. Mitchell*, 2 N. J. L. 998.

PEOPLE'S GAS COMPANY v. TYNER.

[IN INDIANA, 177.]

NATURAL GAS, WHEN BROUGHT TO THE SURFACE OF THE EARTH and placed in pipes for transportation, is property.

SUBTERRANEAN MINES AND WATERS—LAND-OWNER'S RIGHT TO.—He who owns the surface of land may dig therein, and apply to his own purpose whatever he may there find between the surface and the center of the earth. If he thereby draws off water from the land of another, the latter is without redress by any action in the courts.

NATURAL GAS BELONGS TO THE OWNER OF THE LAND, and is a part of it so long as it remains in and upon such land and subject to his control, but if it escapes and goes into other land, and comes under another's control, the title of the former owner is gone.

NATURAL GAS.—A LAND-OWNER HAS THE RIGHT TO INCREASE THE FLOW of natural gas by "shooting" a well on his premises, though by so doing he will draw off and diminish the supply of natural gas in the lands of another.

NATURAL GAS—ENJOINING USE OF DANGEROUS EXPLOSIVES.—One who sinks a gas-well in a thickly populated part of a city will be enjoined from collecting dangerous explosives with which to "shoot" it, if his so doing will endanger the lives or property of persons having no connection with his operations.

INJUNCTION AGAINST CRIMINAL ACT.—The fact that an act complained of has been made criminal by statute does not deprive a court of equity of the power to enjoin its commission or continuance.

J. A. New, C. Downing, and A. M. New, for the appellants.

D. S. Gooding, for the appellee.

COFFEY, J. This was an action by the appellee against the appellants, in the Hancock circuit court, for the purpose of obtaining an injunction.

The complaint alleges, substantially, that the appellee and his wife are the owners, by entireties, of the real estate therein described, which consists of four city lots in the city of Greenfield; that the lots are inclosed together by a fence, and that his dwelling-house and residence, in which he and his family reside, is situated on the lots; that the lots are near the center of the city, and with his residence thereon, are of the value of four thousand dollars; that with full knowledge of all the facts, the appellants, regardless of the rights of the appellee, and of the safety, peace, comfort, and lives of himself and family, have, without his consent and over his objections, within the last forty days, dug and constructed a natural gas-well, to the depth of about one thousand feet, and about two hundred feet distant from the appellee's residence, with only a street forty feet in width between the appellee's lots and the lot on which

the well is sunk; that the appellants are about to "shoot" said well, and will do so unless restrained; that for the purpose of "shooting" the well, the appellants, about midnight of the — day of August, 1889, unlawfully procured to be brought, and unlawfully permitted a large quantity of nitroglycerin, or other nitro-explosive compound, to be and remain, upon Sycamore Street, a public street in the city, and within less than two hundred feet of appellee's residence, for about three hours, in the midst of and surrounded by a large number of people; that appellants, by their employees, threatened and attempted to "shoot" said gas-well, and that they still threaten so to do with their said nitroglycerin, or other nitro-explosive compounds, and will so do unless restrained; that nitroglycerin is highly explosive, and very dangerous to property and life, and is liable to explode under any and all circumstances, and at any time or place, and that an explosion of sixty or one hundred quarts of said explosive, at any given place on the surface of the earth, could, and probably would, destroy life and property for a distance of five hundred yards in all directions from such explosion; that the handling or storing thereof in or about appellants' gas-well will endanger the lives of his family, as well as the safety of his property, and that the shooting of said well with nitroglycerin will greatly injure and damage the appellee's said property both above and under the surface of the earth, and endanger his life and the lives of his family.

This complaint was verified, and upon it, and the affidavits filed in support of its allegations, the court granted a temporary injunction, from which this appeal is prosecuted.

The affidavits filed by the appellee tended to prove that the appellants' gas-well is within the corporate limits of the city of Greenfield; that a short time prior to the filing of the complaint in this cause, the appellants deposited in or near the derrick at the well, described in the complaint, about 117 quarts of nitroglycerin, weighing about 340 pounds, with the intention of exploding the same in the well. The affidavits further tend to show that nitroglycerin is very explosive, and that it is liable to explode at any time; that the explosion of that quantity of nitroglycerin upon the surface of the earth would be likely to destroy life and property at any point within five hundred yards of such explosion.

It is contended by the appellants: 1. That they had the right to use their own property as to them seemed best, and,

for that reason, they could not be enjoined from exploding nitroglycerin in their well for the purpose of increasing the flow of natural gas, though such explosion might have the effect to draw the gas from the land of the appellee; 2. That as bringing nitroglycerin into the corporate limits of a town or city in a greater quantity than one hundred pounds is made a crime by statute, it cannot be enjoined.

On the other hand, it is contended by the appellee: 1. That natural gas is property, and that the appellants have no legal right to do anything upon their own land which will draw such gas from his land, and appropriate it to their own use; 2. That as he is liable to suffer an injury peculiar to himself, to which the public in general is not subject, by the unlawful act of the appellants in bringing nitroglycerin within the corporate limits of Greenfield, he is entitled, for that reason, to an injunction.

It has been settled in this state that natural gas, when brought to the surface of the earth and placed in pipes for transportation, is property, and may be the subject of interstate commerce: *State v. Indiana etc. Co.*, 120 Ind. 575.

Water, petroleum oil, and gas are generally classed by themselves as minerals possessing, in some degree, a kindred nature. As to whether the owner of the soil may dig down and divert a well-defined subterranean stream of water, there is much diversity of opinion and conflict in the adjudicated cases, but the authorities agree that the owner of a particular tract of land may sink a well, and appropriate to his own use all the percolating water found therein, though it may entirely destroy the well on his neighbor's land: *Angell on Watercourses*, sec. 112; *Hanson v. McCue*, 42 Cal. 303; 10 Am. Rep. 299; *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721; *Frazier v. Brown*, 12 Ohio St. 294; *Acton v. Blundell*, 12 Mees. & W. 324; *Delhi Trustees etc. v. Youmans*, 50 Barb. 316; *Mosier v. Caldwell*, 7 Nev. 363; *New Albany etc. R. R. Co. v. Peterson*, 14 Ind. 112; 77 Am. Dec. 60; *City of Greencastle v. Hazelett*, 23 Ind. 186.

It is a familiar maxim, that in contemplation of law land always extends downward as well as upwards, so that whatever is in a direct line between the surface of any land and the center of the earth belongs to the owner of the surface. Mr. Angell says that it would seem to follow from this maxim that whether what is subterranean be solid rock, mines, or porous soil, or salt springs, or part land and part water, the

person who owns the surface may dig therein and apply all that is there found to his own purposes *ad libitum*: Angell on Watercourses, sec. 109.

Upon this principle it was held by this court in the case of *New Albany etc. R. R. Co. v. Peterson*, 14 Ind. 112, 77 Am. Dec. 60, that if an adjoining land-owner, in lawfully digging upon his own land, draws the water from the land of another, to his injury, such injury falls within the description of *damnum absque injuria*, which cannot become the ground of an action.

In the case of *Haldeman v. Bruckhart*, 45 Pa. St. 514; 84 Am. Dec. 511, it was said: "The purchaser of lands on which there are unknown subsurface currents must buy in ignorance of any obstacle to the full enjoyment of his purchase indefinitely downwards, and the purchaser of lands on which a spring rises, ignorant whence and how the water comes, cannot bargain for any right to a secret flow of water in another's land."

Mr. Gould, in his work on waters (2d ed., sec. 291), says: "Petroleum oil, like subterranean water, is included in the comprehensive idea which the law attaches to the word "land," and is a part of the soil in which it is found. Like water, it is not the subject of property except while in actual occupancy, and a grant of either water or oil is not a grant of the soil, or of anything for which ejectment will lie."

In recognition of the principle here announced, in the case of *Brown v. Vandergrift*, 80 Pa. St. 142, it was said by the court that "the discovery of petroleum led to new forms of leasing land. Its fugitive and wandering existence within the limits of a particular tract was uncertain, and assumed certainty only by actual development founded upon experiment."

What is said of the fugitive character of percolating water and of petroleum oil applies with greater force to natural gas.

In the case of *Westmoreland etc. Gas Co. v. De Witt*, 130 Pa. St. 235, it was said: "Water and oil, and still more strongly gas, may be classified by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain.' . . . They belong to the owner

of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his."

It is not denied by the appellee in this case that the appellants have the perfect legal right to sink a well into their own land and draw therefrom all the gas that may naturally flow to it; but he contends that they have no right to explode nitroglycerin in the well to increase the natural flow.

When it is once conceded that the owner of the surface has the right to sink a well and draw gas from the lands of an adjoining owner, no valid reason can be given why he may not enlarge his well by the explosion of nitroglycerin therein for the purpose of increasing the flow. The question is not as to the quantity of gas he may take, but it is a question of his right to take the gas at all.

So far as this suit seeks to enjoin the appellants from exploding nitroglycerin in their gas-well, upon the ground that it will increase the flow of the gas to the injury of the appellee, it cannot, in our opinion, be sustained.

The rule that the owner has the right to do as he pleases with or upon his own property is subject to many limitations and restrictions, one of which is that he must have due regard for the rights of others. It is settled that the owners of a lot may not erect and maintain a nuisance thereon whereby his neighbors are injured. If he does so, and the injury sustained by such neighbor cannot be adequately compensated in damages, he may be enjoined: *Owen v. Phillips*, 73 Ind. 284.

If the appellants in this case have been guilty of the folly of sinking a gas-well in the center of a thickly populated city, where they cannot collect the necessary quantity of nitroglycerin to shoot it without endangering the property and lives of those who have no connection with their operations, they should be content with such flow of gas as can be obtained without such shooting. It certainly cannot be maintained that the destruction of human life is an injury which can be compensated in damages. No authority has been cited, and we know of none, supporting the position of the

appellants, that the appellee is not entitled to an injunction because the accumulation of nitroglycerin within the corporate limits of a town or city is a crime. It has long been settled that a private citizen may maintain an action for a public wrong if he suffers an injury peculiar to himself, and not sustained by the public in general: 3 Bla. Com. 219; *Powell v. Bunker*, 91 Ind. 64; *Ross v. Thompson*, 78 Ind. 90; *Cummins v. City of Seymour*, 79 Ind. 491; 41 Am. Rep. 618; *McCowan v. Whitesides*, 31 Ind. 235; *Fossion v. Landry*, 123 Ind. 136; *First Nat. Bank v. Sarlls*, 129 Ind. 201; 28 Am. St. Rep. 185; *Adams v. Ohio Falls Co.*, 131 Ind. 875.

The sufficiency of the complaint, as it would be when tested by demurrer, is not involved here.

This is a mere temporary injunction. To authorize the court to grant such relief, it was not necessary that a case should be made that would entitle the appellee to relief, at all events, at the hearing. In such cases it is sufficient if the court finds, upon the pleadings and evidence, a case which makes the transaction a proper subject for investigation in a court of equity: *Spicer v. Hoop*, 51 Ind. 365.

In our opinion, the court did not err in granting the temporary injunction in this case.

Judgment affirmed.

SUBTERRANEAN WATERS, LAND-OWNER'S RIGHT TO: See note to *Wheatley v. Baugh*, 64 Am. Dec. 727-730. In the enjoyment of his lands, the owner may cut drains, or mine or quarry, though in so doing he interfere with the flowage of water in hidden, unknown, underground channels; *Haldeman v. Bruckhart*, 45 Pa. St. 514; 84 Am. Dec. 511; *Hanson v. McCue*, 42 Cal. 303; 10 Am. Rep. 299; *Wilson v. New Bedford*, 108 Mass. 261; 11 Am. Rep. 352; *New Albany etc. R. R. Co. v. Peterson*, 14 Ind. 112; 77 Am. Dec. 60; *Village of Delhi v. Youmans*, 45 N. Y. 362; 6 Am. Rep. 100; *Hougan v. Milwaukee etc. R. R. Co.*, 35 Iowa, 558; 14 Am. Rep. 502; *Olase v. Silverstone*, 62 Me. 175; 16 Am. Rep. 419; *Phelps v. Nowlen*, 72 N. Y. 39; 28 Am. Rep. 93; *Bloodgood v. Ayers*, 108 N. Y. 400; 2 Am. St. Rep. 443. The grantee of minerals beneath the surface is not liable to the owner of the surface for the loss of springs occasioned by the ordinary working of the mine: *Coleman v. Chadwick*, 80 Pa. St. 81; 21 Am. Rep. 93.

NUISANCE—KEEPING DANGEROUS EXPLOSIVES.—Several cases in the series in regard to the subject are cited in the note to *Lafin etc. Powder Co. v. Tearney*, 19 Am. St. Rep. 39. The erection of a powder magazine in a populous part of a city, and keeping stored therein large quantities of gunpowder, is *per se* a nuisance: *Cheatham v. Shearon*, 1 Swan, 213; 55 Am. Dec. 734; and this is so, even though the powder be carefully stored and kept: *Heeg v. Licht*, 80 N. Y. 579; 36 Am. Rep. 654.

PUBLIC AND PRIVATE NUISANCES.—The principle that a person who receives special damage from an act declared by law to be a public nuisance

may obtain relief, is most frequently applied to the case of obstructions in highways: See note to *Milarky v. Foster*, 25 Am. Rep. 533-537. An injunction will not be granted to restrain the obstruction of a highway at the suit of one who does not show that he will sustain special damage: *Dawson v. St. Paul etc. Ins. Co.*, 15 Minn. 136; 2 Am. Rep. 109.

ROBY v. SMITH.

[181 INDIANA, 242.]

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT. — A statute of a state denying the right to appoint as trustee any person who is not a resident of the state is invalid, at least as against citizens of other states, because it impairs their privileges and immunities, as granted under article 4, section 2, and the fourteenth amendment, of the constitution of the United States.

D. R. Best, E. A. Bratton, and W. F. Elliott, for the appellant.

J. A. Woodhull and W. A. Brown, for the appellees.

MILLER, J. This action was brought by the appellant, Frank S. Roby, trustee, to foreclose a mortgage on real estate situate in Steuben County, in this state.

In addition to the usual averments, the complaint shows that in September, 1889, the George T. Smith Middlings Purifier Company was the holder of four promissory notes signed by the Steuben Mill Company; that on or about the first day of October, 1889, the purifier company sold and assigned these notes to certain banks in the state of Michigan, the notes being indorsed by George T. Smith; that at the time of the sale and assignment of these notes, the company, by its officers, stated and represented that the notes were secured by a first mortgage on certain mill property situated in Steuben County; that at that time the notes were not in fact secured by mortgage, but subsequently, on the twenty-fourth day of January, 1890, the said George T. Smith, who held the title to the mill property, executed the mortgage in suit to Dwight S. Smith, as trustee, to secure the payment of the above-mentioned notes; that at the time of the execution of the mortgage, Dwight S. Smith, therein named trustee, George T. Smith, the George T. Smith Middlings Purifier Company, and all of the holders of the several notes secured by the mortgage, were non-residents of the state of Indiana, and the mortgage was executed in the state of Michigan,

where they resided; that said Dwight S. Smith, as trustee, brought suit in the Steuben circuit court in March, 1890, to foreclose said mortgage, to which action the defendants therein appeared, and pleaded as an abatement of the action the fact that said Dwight S. Smith was, at the time of the execution of the mortgage, and still remained, a non-resident of the state of Indiana; that such proceedings were had upon the issues thus joined in the action as that the action abated; that said Dwight S. Smith is one of the stockholders of one of the banks who held one of the notes, and as such, is one of the beneficiaries of that instrument; that at the February term, 1891, of this court, Dwight S. Smith, the trustee, and the holders and owners of the notes secured by the mortgage, joined in a petition to this court for the appointment of a resident of the state of Indiana to act as a trustee to foreclose said mortgage; and that the court did, upon their petition, duly and regularly appoint this plaintiff, who is a resident of the state of Indiana, as trustee to foreclose said mortgage; that the plaintiff, as such trustee, at the instance and request and for the use and benefit of all the holders of said notes, brings this action of foreclosure.

Demurrers, filed by each of the defendants, were sustained to the complaint, and final judgment rendered on demurrer for the defendants.

The ruling upon the demurrer is the only question in the record.

The correctness of this ruling depends upon the validity and construction to be given to section 2983 of the Revised Statutes of 1881, in force since May 31, 1879, which is as follows: "It shall be unlawful for any person, association, or corporation to nominate or appoint any person a trustee in any deed, mortgage, or other instrument in writing (except wills), for any purpose whatever, who shall not be, at the time, a *bona fide* resident of the state of Indiana; and it shall be unlawful for any person who is not a *bona fide* resident of the state to act as such trustee. And if any person, after his appointment as such trustee, shall remove from the state, then his rights, powers, and duties as such trustee shall cease, and the proper court shall appoint his successor, pursuant to the provisions of the act to which this is supplemental."

The constitutionality of this act is vigorously assailed by counsel for the appellant.

It is claimed that this act limits the constitutional rights

of citizens of this state to select and appoint their own agents in the control and management of their own property, which is one of the inherent and inalienable rights of a citizen.

The facts of this case do not require us to enter into a discussion of this question.

The contract was entered into in the state of Michigan, by and between citizens of that state, to secure an indebtedness expressly payable in that state. It was, to all intents and purposes, a Michigan contract, except that the land being situate within this state, the mortgage, which is a qualified conveyance of real estate, is subject to the law of the state, so far as it affects the validity and enforcement of the lien: 1 Jones on Mortgages, sec. 662.

The rights of the citizens of this state to appoint non-resident trustees are not involved in this case.

Another question involved in the consideration of the constitutionality of the act under consideration may be excluded from the present discussion; that is the right of a non-resident trustee to prosecute in the courts of this state actions affecting the trust property.

We infer from the last clause of the section that it was the purpose of the legislature in enacting this statute to compel trustees to reside within the state in order to bring them within the process and subject to the control of the state courts.

In the present action the suit was brought by a resident trustee, who owed his appointment to the order of the court, and not to the act of the parties.

We have remaining for determination the question, Does or does not this act, as applied to the facts disclosed in the record, impair the privileges and immunities of citizens of another state or of the United States, as guaranteed in article 4, section 2, and the fourteenth amendment, of the constitution of the United States?

The constitutionality of this act has never been passed upon by this court, although the question seems more than once to have been in the mind of the court.

In holding that this act did not apply to the trustees appointed prior to the passage of the act, the court in *Thompson v. Edwards*, 85 Ind. 414, said: "Waiving all discussion as to the power of the legislature to enact such a statute as applicable to trustees to be thereafter appointed, it is manifest," etc.

In *Bryant v. Richardson*, 126 Ind. 145, 153, it is said that it "may well be doubted" if that portion of this statute which applies to natural persons, and seeks to prohibit them from naming a person who is a non-resident of the state to act as a trustee for them, is valid.

In *Farmers' etc. Co. v. Chicago etc. R'y Co.*, 27 Fed. Rep. 146, Gresham, J., said of this statute: "It is a statute which denies to residents of other states the right to take and hold in trust, otherwise than by last will and testament, real and personal property in Indiana. The right is asserted to deny to persons, associations, or corporations, within or without the state, power to convey to any person in trust, not a resident of Indiana, real or personal property within the state. This is a plain discrimination against the residents of other states. If Indiana may disqualify a resident of another state from acting as trustee in a trust deed or mortgage which conveys real or personal property as security for a debt due to himself alone, or for debts due himself and other creditors, it would seem that the state might prohibit citizens of other states from holding property within the state, and to that extent from doing business within the state. No state can do the latter. A person may, and frequently does, acquire a property interest by a conveyance to him in trust. A citizen of the United States cannot be denied the right to take and hold absolutely real or personal property in any state of the Union, nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others. This right is incident to national citizenship. Section 2 of article 4 of the constitution of the United States declares that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.' 'Attempt will not be made,' says the supreme court of the United States in *Ward v. Maryland*, 12 Wall. 418, 'to define the words "privileges and immunities," or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt, those words are words of very comprehensive meaning; but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business, without moles-

tation; to acquire personal property; to take and hold real estate.'"

In that case one of the trustees, at the time of the creation of the trust, was a resident of the state. The resident trustee having died, the action was prosecuted by the surviving and non-resident trustee. The fact that the language above cited was not strictly essential to the determination of the case before the court may impair the force of the decision as an authority, but it does not detract from the potency of its reasoning.

Reluctant as we are to hold a statute regularly enacted by the general assembly unconstitutional, we cannot avoid the conclusion that the act under consideration is in conflict with those provisions of the constitution of the United States which guarantee to the citizens of each state, and of the United States, all the privileges and immunities of citizens of the several states.

The judgment is reversed, with costs, and the cause remanded for further proceeding in accordance with this opinion.

CONSTITUTIONAL LAW. — THE FOURTEENTH AMENDMENT is discussed at length in the note to *State v. Goodwill*, 25 Am. St. Rep. 870-890.

LOUISVILLE, EVANSVILLE, AND ST. LOUIS CONSOLIDATED RAILWAY COMPANY v. HANNING.

[181 INDIANA, 528.]

MASTER AND SERVANT. — IF A MASTER REQUIRES OF A SERVANT A SERVICE OUTSIDE OF THE DUTIES ordinarily incident to his employment, and subjecting him to additional danger, he does not necessarily assume the additional hazard in undertaking to perform the unusual and extra service, even though the dangers attending it are obvious. If the apparent danger is such that a person of ordinary prudence would refuse to encounter it, the employee proceeds at his peril. Otherwise he may undertake the service, using care proportionate to the apparent increased risk, and if, in so doing, he is injured by the employer's fault, he may recover therefor.

MASTER AND SERVANT — DANGER SIGNALS, OMISSION OF. — If a railway employee is put to work under a car on a side-track outside of the line of his usual duties, and where his safety requires the placing of danger signals to warn persons in charge of other trains of his presence and peril, he is not chargeable with contributory negligence because he relies upon the duty of his employer to place such signals, and does not himself examine and ascertain whether they are in position. If he was

ordered to do special work by his foreman, he had the right to assume, in the absence of warning or notice, that his superior would give the order, and would not by his own negligence make the work unsafe.

MASTER AND SERVANT — VICE-PRINCIPAL. — IF THE DUTY TO PROVIDE A SAFE PLACE in which the servant is to do his work is by the master confided to another servant or employee, the employer is responsible, if the duty is so negligently done that injury results. The duty of providing for the safety of employees rests on the employer, and cannot be delegated.

PLEADING — NEGLIGENCE. — A GENERAL AVERMENT in a complaint that the injured party was himself free from fault or negligence is sufficient, unless overcome by the specific averment of other facts from which the inference must be drawn that he was guilty of contributory negligence.

J. E. Iglehart, E. Taylor, and J. L. Bretz, for the appellant.

C. L. Jewett, J. F. Tieman, and H. C. Jewett, for the appellee.

MCBRIDE, J. This is an appeal from a judgment recovered by the appellee for the alleged negligent killing of her decedent, Henry A. Hanning, who was a car repairer, employed by the appellant in its repair shops at Huntingburg.

The appellant insists that the court erred in overruling a demurrer to the paragraph of complaint on which the case was tried.

Omitting prefatory averments, the complaint avers that, "in repairing defendant's cars, it was necessary for the person employed to do the same to work on top of and around and under said cars, and that to enable said employees, including plaintiff's intestate, to properly and safely perform their labor and duties, the defendant had established certain railroad tracks to be used as repair tracks, and commonly called shop-tracks, over which tracks trains of cars were not run or switched. And plaintiff avers that when cars to be repaired were placed upon said tracks, the repairs could be made with safety to those engaged in making the same. The plaintiff avers that near said repair tracks were certain other railroad tracks of the defendant, to wit, side-tracks, used for the running and switching of trains, and that it was dangerous and hazardous to attempt to repair cars while they were standing upon such side-tracks, without having certain signal-flags so placed so as to warn those engaged in running and switching trains not to run cars or locomotives over said side-tracks when cars were being repaired. But when such signal-flags were properly placed and displayed, cars could be repaired upon said side-tracks without danger. The plaintiff avers that in his said service and employment with the

defendant, plaintiff's intestate undertook to work at repairing cars when the same were placed upon said shop-tracks, but did not agree or undertake to repair cars when standing upon such side-tracks, or to subject himself to the dangers and hazards of so doing.

"The plaintiff further avers that on the twenty-sixth day of August, 1889, while the plaintiff's intestate, Henry A. Hanning, was in the service and employment of defendant as aforesaid, he was directed and required by one M. Contant, the defendant's general foreman, to whose orders such Henry Hanning was then and there subject, to go to one of the side-tracks aforesaid, called side-track No. 1, and to there repair a certain flat-car then standing thereon; and in obedience to said order, said Henry A. Hanning went to said side-track and proceeded to repair said car; that the nature of said repairs required the said Henry A. Hanning to go beneath one end of said car, and remain at work in a stooping position behind the trucks, with his back to the same, where he could not see or discover the approach of locomotives or cars upon said side-track. The plaintiff avers that it was the duty of defendant and of said Contant, as said general foreman, to cause signal flags to be placed, to warn trainmen not to run cars or locomotives upon said side-track No. 1, while said Henry A. Hanning was at work under said flat-car, and that he, Hanning, worked under said car, believing that defendant and said Contant had performed their duty in that regard and placed said flags; but the plaintiff says that the defendant and said Contant negligently failed to place, or cause to be placed, any signal-flag to prevent cars or locomotives from running upon said side-track; that while said Henry A. Hanning, in performance of his duty, was so at work under said flat-car, and behind the trucks, and without any notice or warning to him whatever, and without his knowledge, the defendant caused a locomotive and train of cars to be run into, upon, and over said side-track, and against said flat-car, with great force and violence, whereby said car and the trucks thereof were run against and over said Henry A. Hanning, and he was crushed, injured, and killed. The plaintiff avers that the injuries and death of said Henry A. Hanning were occasioned solely by the negligence of the defendant in failing to have any signal flag placed or displayed to prevent cars and locomotives from running on and over said side-track

No. 1, and without any fault or negligence of said Henry A. Hanning," etc.

Counsel for the appellant, as we understand their contention, insist, in substance, that the legitimate inferences that must be drawn from the specific statement of the acts of the decedent overcome the general averment that he was without fault or negligence, and show that, notwithstanding, he was guilty of contributory negligence; that being directed to work in an unusual place, where he would be exposed to greater dangers, of which he had knowledge, he had no right to rely upon the presumption that others had done their duty, but that it was his duty to personally investigate and ascertain if the proper signals were in fact displayed, and the place in which he was directed to work thereby made safe.

No authority need be cited in support of the firmly settled rule requiring the master to use at least ordinary care to furnish to his employees a reasonably safe place to work. The term "safe place to work," as thus used, is, of course, necessarily relative. It does not mean a place absolutely free from danger, as some vocations, from their very nature, involve the constant encountering of danger.

The rule is equally well settled that a servant impliedly assumes all of the ordinary and usual risks incident to his service, so far as they are known to him, or so far as one of his age and experience ought, in the exercise of ordinary care, to be able to discern them, even where the duties of the service are necessarily hazardous: *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, and authorities there cited.

If, however, the master requires of him a service outside of the duties ordinarily incident to his employment, and subjecting him to additional danger, he does not necessarily assume the additional hazard in undertaking to perform the unusual and extra service, even although the dangers attending it are obvious.

If the apparent danger is such that a person of ordinary prudence, exercising that prudence, would refuse to encounter it, the employee proceeds at his peril. Otherwise, he may undertake the service, using care proportioned to the apparent increased risk, and if, in so doing, he is injured by the employer's fault, he may recover for the injury: *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327.

Here a service was required of the decedent outside of the line of his employment, and at a place other than that pro-

vided for the performance of his regular and ordinary duties. The averments of the complaint shows that he was required to perform this service, in the particular place indicated, by the direction "of his superior, to whose orders he was subject." Its performance would subject him to great danger, unless certain precautions were observed in the placing of signal-flags. These dangers grew out of the place in which he was required to work, and were, it is averred, unknown to his regular employment. It is also averred that these dangers could be entirely obviated by the placing of the flags. With the flags properly placed it was a safe place in which to work.

The act of assigning to the decedent the new place to work was the act of the master, no matter who acted as his representative in so doing. The master's duty required the exercise of at least ordinary care to make and keep the place safe while the work was being done, which, as above stated, could have been done by properly placing the signal-flags referred to. While Hanning was not absolved from the duty of using his judgment and his senses for his own protection, he was justified in assuming that the master would be mindful of his duty, and would not wantonly expose him to peril. If it were shown that Hanning knew that no signal-flags were displayed, and that no precautions had been taken for his safety, a very different question would be presented. But it is averred that he believed that the proper precautions had been observed. So far as the averments of the complaint are concerned, it cannot be said that this belief was not justified.

Rules well settled by repeated decisions of this and other courts sustain the sufficiency of this complaint.

In the case of *Taylor v. Evansville etc. R. R. Co.*, 121 Ind. 180, 16 Am. St. Rep. 372, this court said: "It is important to bear in mind that the appellant was performing a special duty enjoined upon him by a superior whom it was his duty to obey. Although the work was within the general scope of his service, nevertheless he was performing it under a special order. It was therefore a wrong on the part of the agent having the right to order him to do the specific work to increase the peril of the service by his own negligence. The employee, acting under the specific order, had a right to assume, in the absence of warning or notice, that his superior who gave the order would not, by his own negligence, make the work unsafe."

In the case of *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409, 19 Am. St. Rep. 180, 190, the court says: "It is a gen-

eral rule that if a master directs the servant to do some act which is even dangerous, but which could be made safe by special care upon the part of the master, the servant has the right to assume that such special care will be taken; and, failing to exercise such care, the master is held liable."

In *Brazil Block Coal Co. v. Young*, 117 Ind. 520, the court says: "It is established law that an employer must use ordinary care and reasonable skill to make safe the place where he requires his employees to work. . . . This is a duty which rests upon the employer, and which he cannot delegate. No matter by whom the duty is performed, the employer is responsible if it is negligently performed, and from that negligence injury results. The employer cannot escape liability by delegating it to an agent. . . . The duty of the employer to use ordinary care and skill to make the working place he provides for his employees reasonably safe exists, no matter how dangerous may be the service. He does not warrant the safety of the working-place, but he does undertake that he will use reasonable skill and care to make it as safe as the nature of the service will admit. He must do what ordinary care and diligence can do to make the place reasonably safe."

In *Cincinnati etc. R'y Co. v. Lang*, 118 Ind. 579, it is said: "The duty of providing for the safety of employees rests on the employer, and cannot be delegated. In this instance the duty of exercising reasonable care to prevent injury to the intestate while going to the place where he was ordered, and providing for his security, rested upon the appellant. It was therefore the duty of the master that was neglected, and it was this neglect of duty, and not that of a fellow-servant, which caused Jacob Lang to lose his life."

In *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 588, it is said: "An employee who does what he is ordered to do is not in fault, but is protected to a reasonable extent, by the order while engaged in performing the special duty enjoined upon him."

In *Cincinnati etc. R'y Co. v. Roesch*, 126 Ind. 445, it is said by Mitchell, J.: "An employee has the right to repose confidence in the prudence and caution of his employer, and rely upon the safety and suitableness of implements or appliances with or about which he is required to work, and that the place assigned him to work is safe from any hidden or undisclosed perils which are not open and obvious to his senses."

See also *Louisville etc. R'y Co. v. Graham*, 124 Ind. 89; *Pennsylvania Co. v. Whitecomb*, 111 Ind. 212; *Krueger v. Louisville etc. R'y Co.*, 111 Ind. 51. Indeed, this list of citations might be extended indefinitely.

It is also settled as the law in this state, in cases of this character, that a general averment in the complaint that the injured party was himself free from fault or negligence is sufficient, unless it is overcome by the specific averment of other facts, showing, notwithstanding, that he was guilty of contributory negligence: *Stewart v. Pennsylvania Co.*, 130 Ind. 242; *City of Wabash v. Carver*, 129 Ind. 552, and cases cited in both.

In our opinion, the objections urged against the complaint are not tenable. It states a good cause of action.

The only other proposition argued by counsel for the appellant is, that the court erred in giving to the jury the following instruction: "In determining whether the company was negligent in not displaying a signal-flag at the head of switch-track No. 1 (if in fact no such signal was so placed), or whether the decedent, Hanning, was negligent in going under the cars without himself placing the signal at the head of the switch-track on which the car stood that was to be repaired, it is important that the jury should observe the rules of law. If Contant was the foreman under whom Hanning worked, and to whose orders he was subject, and as such foreman ordered Hanning to repair the car on the track where it stood, in the absence of any rules on the subject of signals, or previous direction to Hanning on that subject, it would have been the duty of the foreman, in behalf of the company, to see that the place where Hanning was to work was made reasonably safe. And if the place could have been made safe by placing a signal-flag at the head of the switch-track, it would have been the duty of the foreman to have the signal-flag so displayed; and a failure on the part of the foreman to discharge that duty would have been the failure of the company. But, on the other hand, if at the time Hanning was directed to make repairs on the side of the car (and any other needed repairs if so directed), he knew that it was his duty, and one of the rules of the company required that if he went under the car he must himself place a signal-flag at the head of the switch-track, and so knowing the rule, and his duty in that respect, neglected to display a signal-flag, but went under the car without first complying with that duty, and by

reason of his failure to so display a signal-flag he was injured and killed, in that view of the case the decedent was not without fault as charged in the complaint, and the plaintiff cannot recover."

This instruction correctly states the law, and the court did not err in giving it. The reasons which impel us to this conclusion sufficiently appear in what we have said regarding the sufficiency of the complaint, and require no further elaboration.

Judgment affirmed, with costs.

MASTER AND SERVANT—INCREASED RISK—ASSUMPTION BY SERVANT.—The risks assumed by an employee are those reasonably incident to his employment, and no others unless unusual and unreasonable risks are open and visible, and known to the employee: *Nadas v. White River Lumber Co.*, 76 Wis. 120; 20 Am. St. Rep. 29, and note. A servant assumes the risks ordinarily incident to his employment; but he has a right to expect his employer to use appliances reasonably safe for his use, and assumes no risks for them unless he has been fully advised as to their defective character: *Eumel v. Dilworth*, 131 Pa. St. 509; 17 Am. St. Rep. 827, and note. A servant who engages to do hazardous work takes the risks incident thereto, but if the master by a negligent act not involved in the work causes the servant to receive injury, he is responsible therefor, if the servant was not also negligent: *Woodward v. Shumpp*, 120 Pa. St. 458; 6 Am. St. Rep. 716, and note. A servant assumes not only the ordinary risks of his master's service, but also such other risks as are apparent to ordinary observation: *Keas v. Detroit Copper etc. Mills*, 66 Mich. 277; 11 Am. St. Rep. 492, and note. The fact that a master has requested the servant to perform a temporary work outside of his ordinary employment is no violation of duty, but if he has neglected some duty toward such servant he will be liable for injury caused by such neglect: *Cole v. Chicago etc. R'y Co.*, 71 Wis. 114; 5 Am. St. Rep. 201, and note.

MASTER AND SERVANT—VICE-PRINCIPAL—LIABILITY FOR NEGLIGENCE OF.—It is a master's duty to exercise reasonable care in providing a safe place for his servants to work, and he cannot escape liability for a failure to do so from the fact that he delegated such duty to another: *McElligott v. Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181, and note; *Carter v. Oliver Oil Co.*, 34 S. C. 211; 27 Am. St. Rep. 815; *Ell v. Northern Pac. R. R. Co.*, 1 N. D. 336; 26 Am. St. Rep. 621; *Ingerman v. Moore*, 90 Cal. 410; 25 Am. St. Rep. 138, and note.

NEGLIGENCE—PLEADING WANT OF.—A general averment in the complaint that plaintiff was without fault is sufficient: *Ohio etc. R'y Co. v. Walker*, 113 Ind. 196; 3 Am. St. Rep. 638, and note. A defendant suing for injuries which he claims to have suffered from the negligence of the defendant need not make any explicit allegation that he was without fault: *Mages v. North Pacific etc. R. R. Co.*, 78 Cal. 430; 12 Am. St. Rep. 69, and note, with cases on the subject collected.

LOUISVILLE, EVANSVILLE, AND ST. LOUIS CONSOLIDATED RAILROAD COMPANY v. PRITCHARD.

[121 INDIANA, 864.]

NEGLECTANCE. — CONTRIBUTORY NEGLIGENCE on the part of the plaintiff will not be presumed from the fact that she was an infant at the time of receiving injury, and was in charge of a two-horse team.

HIGHWAYS — RAILWAY CROSSINGS. — IT IS THE DUTY OF A RAILWAY CORPORATION, upon building its railroad across a highway, to restore it as nearly as possible to its former condition, and failing to do so, it is liable for damages sustained on account of injuries received by reason of the unsafe condition in which the highway was left, provided the injured party used care commensurate with the apparent danger.

RAILWAY CORPORATIONS — HIGHWAY CROSSINGS. — A GIRL INJURED BY BEING THROWN OUT OF A VEHICLE at a point where a railway crossed a highway, because the highway had been left several inches below the railway track, is entitled to recover for such injury, though she was driving a team at the time, and it was moving from fright, if it was not unmanageable, and the accident would not have occurred had the highway crossing been put and kept in proper condition by the railway corporation.

N. R. Peckinpaugh and J. H. Weathers, for the appellant.

R. J. Tracewell, O. L. Jewett, and H. E. Jewett, for the appellee.

OLDS, J. This action is brought by the appellee against the appellant for damages resulting to appellee by reason of an injury sustained on account of the negligence of the appellant in permitting their railroad and track to remain out of repair and out of grade at a highway or street crossing. It is alleged in the complaint that in constructing the railroad it was constructed at a grade fifteen feet higher than the grade of the highway, and the crossing was arranged so that there was a sharp and steep elevation and approach to the track on either side of the railroad, and that on either side of the railroad there was a drop from the top of the track to the top of the grade of the street or highway of some fifteen or eighteen inches, so that in crossing the track on said highway there was a sudden rise or jog of fifteen inches to pass over, and a sudden jog or drop of the same distance on going off the railroad track; that by reason of this sudden drop the appellee, Lota Pritchard, was thrown from the two-horse spring wagon in which she was riding at the time she was driving across said track, and very seriously injured.

The first question presented relates to the sufficiency of the complaint. It is contended by the appellant that it is not sufficient, for the reason that it appears from the averments that the appellee was an infant, and that she was driving the two-horse team, and *prima facie* it is negligence for an infant to drive a two-horse team, and therefore it shows the appellee to have been guilty of contributory negligence, and the demurrer ought to have been sustained to the complaint. Appellant cites no authority in support of this theory, and we do not think it a proper rule to adopt. The complaint does not state the age of the appellee. For aught that appears in the complaint, she may have been over twenty years of age at the time of the injury. It is alleged that she was without fault or negligence.

There are no averments in the complaint to show that she was guilty of contributory negligence. The fact that she was an infant and was driving the horses does not of itself establish contributory negligence. There was no error in overruling the demurrer to the complaint.

It was the duty of the appellant, upon building its railroad across the highway, to restore the highway as nearly as possible to its previous condition, and failing to do so, it was liable for damages sustained on account of injuries received by reason of the unsafe condition in which it was left, provided the injured party used care commensurate with the apparent danger. And as to whether due care was used or not is a question of fact for the jury. The complaint at least contains proper averments: *Indianapolis etc. R. R. Co. v. State*, 37 Ind. 439; *Indianapolis etc. R. R. Co. v. Stout*, 53 Ind. 143; *Evansville etc. R. R. Co. v. Crist*, 116 Ind. 446; 9 Am. St. Rep. 835; *Evansville etc. R. R. Co. v. Carver*, 118 Ind. 51.

It is urged that the evidence is not sufficient to sustain the verdict, and it is insisted that it was contributory negligence to leave a team of horses so near the railroad in charge of a girl of the age of the appellee.

There is evidence authorizing the jury to have found that the horses were gentle and docile, that appellee had been accustomed to driving one of them a great deal during the year prior, and had driven both of them together quite a number of times within a short time previous to the injury; that she had driven in the vicinity of the railroads and cars and across railroads, and that the horses were not afraid of or liable to be frightened by the cars, and did not frighten at

them, and there was no reason to apprehend that the horses would become frightened at the cars, or that there would be any danger in leaving them in charge of the appellee. The appellee at the time of the injury was twelve years of age, had been traveling for the past year with her father, selling organs, and was accustomed to driving and handling these same horses. On this occasion the horses became frightened at a train coming from behind and passing them, and turned around and started across the railroad at quite a rapid gait, though it does not appear from the evidence that the horses appeared to be extraordinarily frightened, or that they were beyond the control of the appellee and running away, but the appellee testifies that as they went up the grade to the railroad she put her foot on the brake, and that she would have stopped them if it had been level, but that as the front wheels of the wagon dropped down when it went over the railroad it threw her out. The horses were stopped immediately afterwards in a very short distance from the track, and nothing whatever was injured. The appellee was using all the care she could, under the circumstances, in crossing the track, and was guilty of no fault. The jury may have properly found from the evidence in the case that the horses were started by the train, but the appellee was able to manage them, and had materially checked their gait when they reached the railroad track, and would have controlled and stopped them had it not been for the dangerous condition of the crossing, by reason of which she was thrown from the vehicle, and we think the evidence sustains the verdict. It does not present a case of horses taking fright at the lawful movement of the cars, and becoming unmanageable, running away and upsetting the vehicle, or running against an obstacle and injuring a party. In such a case the railroad company would be guilty of no wrong. The horses took fright at the lawful act of the company, and the injury would be the result of the fright to the horses. But not so in the case at bar. The fright to the horses does not appear from the evidence to have been such as would have prevented the appellee from controlling them and avoiding all injury had she not been compelled to cross the track at a point where the appellant had failed to put it in repair, as it was its duty to do, and by reason of its negligence it had become and was dangerous to cross with vehicles, and in crossing the track at such point, by reason of

such condition of the crossing, appellee was thrown from her buggy and injured, without her fault.

Some objections are urged to the instructions given in the case, particularly to the action of the court in refusing to give the third instruction requested by the appellant as requested, and modifying the instruction, and giving it as modified. There was no error in the instruction as given, and the instruction as requested was not applicable to the facts in the case, and would have had a tendency to mislead the jury, and the court properly modified it. We think the instructions fairly presented the law of the case, and we find no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

RAILROAD COMPANIES — DUTY TO MAINTAIN SAFE CROSSINGS. — Railway company must maintain street or highway crossings in a reasonably safe condition when it has changed or altered them for its own convenience: *Louisville etc. R. R. Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155; *Tetherow v. St. Joseph etc. R'y Co.*, 96 Mo. 74; 14 Am. St. Rep. 617; *Missouri Pac. R'y Co. v. Bridges*, 74 Tex. 520; 15 Am. St. Rep. 856; *Terre Haute etc. R. R. Co. v. Clem*, 123 Ind. 15; 18 Am. St. Rep. 303; *Kansas City v. Kansas City etc. R'y Co.*, 102 Mo. 633. As to evidence admissible to show the condition of the crossing, see *Phelps v. Winona etc. R. R. Co.*, 37 Minn. 495; 5 Am. St. Rep. 867; *Birmingham etc. R'y Co. v. Alexander*, 93 Ala. 123.

CASES
IN THE
SUPREME COURT
OF
IOWA.

MOODY v. FUNK.

[33 IOWA, 1.]

REDEMPTION BY GRANTEE OF MORTGAGOR AFTER JUNIOR LIEN-HOLDER'S RIGHT TO REDEEM IS BARRED, EFFRONT OF. — When a mortgagor, after a senior mortgage is foreclosed, and after the right of a junior mortgagee to redeem from the foreclosure sale is barred by lapse of time, conveys his interest in the land mortgaged, his grantee may redeem without removing such bar, and thus perfect in himself the title to the land sold. Such grantee will then hold the land discharged from the lien of the junior mortgage, and may maintain an action in equity to quiet his title as against such lien.

ACTION in equity to restrain the enforcement of a mortgage. A demurrer interposed to the petition having been overruled, the defendant, Peter Funk, elected to stand upon his demurrer, whereupon judgment was rendered in favor of the plaintiff, and the defendant appealed. Other facts are stated in the opinion.

M. D. O'Connell, for the appellant.

O. J. Jolley, for the appellee.

ROBINSON, J. The facts admitted by the pleadings which are material to a determination of this case are substantially as follows: One James J. Gordon was the owner of the eighty-acre tract of land in controversy from the eighth day of March, 1884, until the fifteenth day of November, 1886. On the date first named, he executed a mortgage on the land in favor of the Aetna Life Insurance Company, to secure the sum of six hundred dollars. On the seventeenth day of the same month he executed a second mortgage to the defendant Funk, to

secure the sum of two hundred dollars. On the fifteenth day of November, 1886, he conveyed one forty-acre tract of the land to his wife, and on the third day of February, 1888, he conveyed to her the remainder. The mortgage to the *Ætna Life Insurance Company* was foreclosed in April, 1887, the defendant Funk being made a party to the foreclosure proceedings; and on the twentieth day of June, 1887, all the land was sold to the *Ætna Life Insurance Company* to satisfy the judgment of foreclosure. On the twelfth day of May, 1888, Mrs. Gordon and her husband conveyed the land to plaintiff, and on the eighteenth day of the next June, he redeemed the land from the foreclosure sale by paying to the clerk of the district court of Calhoun County the amount required for that purpose. The plaintiff seeks to have the defendant Funk enjoined from enforcing his mortgage against the land, and asks to have his title quieted as against that mortgage. As a ground of demurrer, the defendant Funk alleged that the averments of the petition do not entitle plaintiff to the relief demanded.

In *Crosby v. Elkader Lodge*, 16 Iowa, 400, it was held that real estate sold in partial satisfaction of a judgment lien thereon was subject to a second sale to satisfy the remainder due on the judgment, after redemption from the first sale by a purchaser of the interest of the judgment debtor. It was said that "if the debtor or his grantee redeem land which had been sold in part satisfaction of a subsisting judgment, the property at once becomes liable to satisfy the unpaid balance of the execution from the moment of such redemption." That decision, so far as it was applicable to redemptions made by the grantee of a judgment debtor, was in effect overruled by subsequent decisions: *Clayton v. Ellis*, 50 Iowa, 590, and cases therein cited. There is not entire harmony in the language of some of the cases in regard to the rights of junior lien-holders, and the effect of redemptions, and both parties to this appeal rely with much apparent confidence upon decisions of this court as supporting their respective claims. But it will be found that the conflict is chiefly between statements in the nature of *dicta*, rather than between the decisions on questions actually involved. Thus in *Clayton v. Ellis*, 50 Iowa, 590, it was said that "the better rule is, that the lien of the judgment as to the unsatisfied balance on the real estate sold is as to all persons and in all cases divested by the sale"; but the question actually involved and determined was, "whether the

holder of an unsatisfied balance of a judgment can redeem from an execution sale made under the same judgment," and it was answered in the negative. That decision was approved in *Hayden v. Smith*, 58 Iowa, 285; *Todd v. Davey*, 60 Iowa, 534. That the lien of the judgment would not be divested "as to all persons" by the sale was held, in effect, in *Harms v. Palmer*, 73 Iowa, 346, 5 Am. St. Rep. 691, *Campbell v. Maginnis*, 70 Iowa, 589, *Peckenbaugh v. Cook*, 61 Iowa, 478, and other cases; for it was said in the cases cited, that if the judgment debtor redeem, the land redeemed would become subject to the lien of the unpaid portion of the judgment. But there is a marked difference between the case of a redemption by the judgment debtor and that of a redemption by his grantee. It is the policy of the law to secure to the debtor, as nearly as is practicable, the full value of his property sold on execution. If the execution creditor fail to bid for the land sold a just amount, the debtor should be permitted to transfer his interest to another for a fair consideration; and if his grantee redeem, the execution creditor has no right to complain, for he might have bid for the land a larger sum. Nor is a junior lien-holder prejudiced by such a transfer. It does not affect his right to redeem within the time given him by law, and if he is not willing to give more for the land than the amount for which it was sold, he should not prevent the debtor from realizing what he can for his property. Where the debtor redeems, and thus restores to his estate land subject to execution for other debts, there is more ground for holding that it may again be sold to satisfy the remainder of the unpaid judgment. But however that may be, we are of the opinion that the grantee of the execution debtor, who, as in this case, acquires the interest of his grantor after the right of a junior lien-holder to redeem is barred by lapse of time, may redeem without removing such bar, and thus perfect in himself the title to the land sold. Our conclusion has support in the following cases: *Harms v. Palmer*, 73 Iowa, 446; 5 Am. St. Rep. 691; *Campbell v. Maginnis*, 70 Iowa, 590; *Peckenbaugh v. Cook*, 61 Iowa, 478; *Escher v. Simmons*, 54 Iowa, 275; *Clayton v. Ellis*, 50 Iowa, 590.

The judgment of the district court is affirmed.

MORTGAGES — REDEMPTION. — As to who may redeem from foreclosure, see note to *Horn v. Indianapolis Nat. Bank*, 21 Am. St. Rep. 245-249, and especially at page 246, where the right of grantees of the equity of redemption to redeem is discussed.

TOMLINSON v. LITZE.

[32 IOWA, 32.]

JUDGMENT OF JUSTICE OF PEACE NOT ENTERED IN TIME VOID.—When a justice of the peace fails to enter a judgment until more than ninety days after a verdict has been returned in the case, a judgment then rendered by him is without jurisdiction and void; and if the judgment debtor does not hear of the entry of such judgment until more than a year after it is made, he may then maintain an action in equity to have the judgment canceled.

ACTION in equity to set aside and cancel the record of an alleged judgment. Judgment was rendered in favor of the defendant, and the plaintiff appealed. Other facts are stated in the opinion.

Welch and Welch, for the appellant.

No appearance for the appellee.

ROBINSON, J. The record submitted to us discloses the following facts: In August, 1886, the defendant commenced an action against plaintiff before one G. W. Halsey, a justice of the peace, to recover the sum of one hundred dollars. On the twenty-sixth day of that month there was a trial by jury, which resulted in the return of a verdict on the same day, in favor of the plaintiff in that action, for the sum of thirty-five dollars. On the eleventh day of September, 1886, and again on the sixteenth day of that month, the defendant in that action went to the office of the justice with an appeal bond for the purpose of taking an appeal, but found that judgment had not been entered. On the third day of November, 1886, an attorney for plaintiff visited the office of the justice and found that no judgment had then been entered. The justice moved out of the township in which he resided when the trial was had, about the 1st of December, 1886, and just before he left, he entered judgment on the verdict, but the plaintiff was not advised of that fact, although effort was made in his behalf to ascertain what the justice had done. A transcript of the judgment so entered was filed in the office of the clerk of the district court of Jones County on the seventh day of April, 1888, the amount of the judgment for damages and costs then being more than one hundred dollars. The plaintiff claims that he first learned of the judgment about the time this action was commenced in August, 1888; that the verdict was unjust; that he owed defendant nothing, and had the justice

entered a judgment as required by law, he should have appealed therefrom, and had another trial; and that he was prevented from taking an appeal by reason of the failure of the justice to perform his duty. He asks that the judgment be set aside and canceled, and that he have general equitable relief.

Section 3552 of the code, in regard to proceedings in justices' courts, is as follows: "In cases of dismissal, confession, or on the verdict of a jury, the judgment shall be rendered and entered upon the docket forthwith. In all other cases, the same shall be done within three days after the cause is submitted to the justice for final action." In this case, more than ninety days elapsed after the return of the verdict before judgment was entered. In *Burchett v. Casady*, 18 Iowa, 344, it was said that the "forthwith" of the statutes means "in a reasonable time," and an entry of judgment on Monday on a confession of judgment filed with the justice late in the evening of the preceding Saturday was sustained. So in *Davis v. Simma*, 14 Iowa, 156, 81 Am. Dec. 462, it was held that a judgment rendered at eleven o'clock, A. M., of one day, on a verdict which was returned to the justice at half-past ten o'clock of the preceding evening, was in time. But in that case it was said that the legislature has directed that the justice shall, without delay, enter the judgment in such cases, because there is no occasion for deliberation on his part, but that the justice is not required to work at unreasonable hours, and that he is not allowed three days in which to enter the judgment. In *Harper v. Albes*, 10 Iowa, 390, it was held, that the justice having failed to enter a judgment on a verdict for nearly sixty days after the verdict was returned, his right to do so was gone, and a judgment entered by him after that time was void: *Guthrie v. Humphrey*, 7 Iowa, 25. We are of the opinion that the delay in entering judgment in this case was so great that the judgment entered was without jurisdiction, and is void. Had the plaintiff discovered the action of the justice in rendering judgment in time, he might have had that action reviewed by *certiorari*, but it appears that he did not learn of it until more than a year had elapsed after it was done, and until a transcript of the judgment had been filed in the district court. It was then too late to resort to that remedy. We are of the opinion that plaintiff has shown himself entitled to the relief asked: *Dady v. Brown*, 76 Iowa, 528.

Reversed.

JUSTICES OF THE PEACE—ENTRY OF JUDGMENT. — A justice of the peace, being required by statute to render a judgment within a given time, cannot do so afterwards: *Sibley v. Howard*, 3 Denio, 32; 45 Am. Dec. 443, and note.

SPRY v. WILLIAMS.

[32 IOWA, 61.]

BENEFIT SOCIETY, PROVISIONS OF CERTIFICATE OF, NOT EXTENDED TO POSTHUMOUS CHILD. — When a widower who receives a benefit certificate in the Ancient Order of United Workmen, in which his three children are designated as beneficiaries, subsequently marries, and after his death a child of such marriage is born, the provisions of the contract represented by the certificate will not be extended beyond its terms so as to include such posthumous child. Such a certificate is not at variance with a by-law of the society, which provides that its object is "to afford financial aid and benefit to the widows, orphans, and heirs or devisees of deceased members."

JOHN F. MEYER was alleged in the petition to have received, in 1885, a benefit certificate in the Ancient Order of United Workmen, in which his three children were named as beneficiaries. These were the only children he had at that time. He afterwards married again, and after his death Jessie Fay Meyer was born of the marriage. The plaintiff was her guardian, and the defendant was the guardian of the other children named in the certificate. The society paid the amount of the certificate to the defendant, and this action was brought to compel him to pay to the plaintiff, for the use of Jessie Fay Meyer, one fourth of the avails of the certificate. The district court sustained a demurrer to the petition, and gave judgment thereon for the defendant, and the plaintiff appealed. Other facts appear from the opinion.

Morgan and Evans, for the appellant.

Williams and Powell, for the appellee.

GRANGER, J. The point first made in argument, and probably chiefly relied upon, is, that where there is a "variance" between the laws of the society and the certificate, the former must govern. The correctness of this proposition we need not discuss. We may more profitably inquire if there is such a variance. We should keep in view in our reasoning that the merit of appellant's contention is, that as a result of sustaining the demurrer by the district court, Jessie Fay Meyer is denied an interest in her father's estate, as, barring the certi-

ficante in question, he left no estate, and much stress is placed on the equitable thought involved.

The articles of incorporation of the society provide: "2. The business and object for which said society is formed is to provide, secure, and give financial aid to the widows, children, heirs at law, and legatees of deceased members thereof, in accordance with the rules, regulations, and by-laws of said society." A provision of the by-laws is as follows: "The business and object of this society shall be to afford financial aid and benefit to the widows, orphans, and heirs or devisees of deceased members." It has been often held, and the rule is not disputed in this case, that a member of such a society may receive a certificate designed only for the benefit of one of such classes, to the exclusion of the others, as for the widow, omitting the children, or for the children, omitting the widow, or for one of several children, omitting the others. It is a fact, then, that the member receiving the certificate may determine who of the classes designated by the law as beneficiaries shall be the beneficiary in his particular case, and the fact that he thereby does injustice to others will not defeat his purpose. The equitable thought then is available only in cases of doubtful interpretation, when it should have liberal influence, presuming the party in making such provisions designed to act justly.

At the time the certificate was taken, John F. Meyer had but the three children named in the certificate, and was then unmarried. At that time his children named were the only ones dependent upon him, and it could not well be said that he did not then conform by his certificate with the full spirit of the law. Had John F. Meyer died before his marriage with the mother of Jessie Fay Meyer, no question could well have arisen as to the proper beneficiaries, or as to his intent. The transaction giving rise to such a certificate is a contract between the member receiving the certificate and the society: *Felix v. Grand Lodge A. O. U. W.*, 31 Kan. 81; 47 Am. Rep. 479. The contract at its inception fixes the obligation of the society for payment, the amount to be paid by the member for the benefit, and who is or are to be the beneficiaries. As a part of the contract, the society was under obligations to pay only the beneficiaries named in the certificate. The contract provided for changing the beneficiaries, but only at the instance of John F. Meyer, and then by a return of the certificate and receiving a new one, with the new beneficiary

named therein: By-laws of Society, art. 8, sec. 2. Now, if we are to hold that, because of the birth of Jessie Fay Meyer after the certificate issued, and after the death of her father, she is a beneficiary, the effect of the holding is to permit the law to make a contract never intended by the parties. At the time of John F. Meyer's death, the obligation of the society became fixed, and Jessie Fay was then unborn, and it could not then be said that she was a beneficiary in the certificate. If the certificate had then been paid, could Jessie Fay, after her birth, have had a right of action for any part of the proceeds? Certainly not.

It is said that it could not have been the intention of Meyer to have made provision for a part of his children only. Without admitting the fact, it may be said that he did not make such a provision. He made provision for all he then had, and it is the intent of that time that is to govern. There is no support for the claim that there is a variance between the laws of the society and the certificate. The certificate provides that the benefit shall be paid to "Ulysses S., William J., and Etta Meyer, his children, or the legal representative of the said John F. Meyer." No claim is made that the payment should have been made to the legal representative. The words "his children" refer to those named, and cannot properly be construed to mean or embrace others yet unborn. On so plain a proposition there should be no dispute, nor can equitable considerations overrule an intent so manifest and legal. After his marriage with the mother of Jessie Fay Meyer, he had the opportunity to so change his certificate as to extend its benefits to his widow and unborn child, which he did not do. And it is equally as unreasonable and inequitable to omit from its benefits his widow as her child. He knew the situation, and we should assume that he had reasons for not making the change. The record does not disclose what property rights the widow possessed. They may be abundant for her and her child, who would inherit from her, while his children by a former marriage would not. If the court should attempt, on the face of this record, to make the conduct of Meyer more equitable by creating a new beneficiary, it might defeat that which is absolutely just.

It is to some extent urged to us in argument, and our consideration of the case has led us to consider the analogy of the law as applicable to this case, and that governing the validity of wills, as the same rules of law often apply in de-

termining the rights of parties under wills and beneficiary certificates. Appellant, in argument, quotes the following section of the code: "Sec. 2334. Posthumous children unprovided for by the father's will shall inherit the same interest as though no will had been made." In *Alden v. Johnson*, 63 Iowa, 124, and cases there cited, this court held that the birth of a child to a testator subsequent to the making of the will, and before the death of the testator, would operate as an implied revocation of the will. Such rule is without application to the facts of this case. The purpose of this case is to extend the provisions of the certificate or contract beyond its terms, and include another as beneficiary. The law has never extended the provisions of a will to include one not specified as a legatee therein; but following the rules of the civil law as to presumptions, it revokes the will, and places the property of the estate under the direction of the law as to distribution. In such a case the revocation of the will takes effect before the death of the testator on the birth of the child. If we apply the rule to this case, the birth of the child, after the certificate issued, would operate to revoke it, — a result that no one would contend for. The proceeds of such a certificate are not a part of the estate, but go directly to the beneficiary, except where payable to the estate: Bacon on Benefit Societies, sec. 396; *Felix v. Grand Lodge A. O. U. W.*, 31 Kan. 81; 47 Am. Rep. 479. Appellant has cited a number of authorities wherein courts have construed certain expressions in certificates and wills, as that a bequest to the children of a testator means all his children, though by different wives, and in some instances the term "children" has been held to include grandchildren; but there is no case that we have seen where it is held that a bequest or certificate in favor of children, naming them, is to be enlarged by construction, which is really what is asked in this case.

The judgment of the district court is affirmed.

MUTUAL BENEFIT SOCIETIES — DESIGNATION OF BENEFICIARIES: See note to *Newman v. Covenant etc. Ass'n*, 14 Am. St. Rep. 203; note to *Bankers' etc. Ass'n v. Stopp*, 19 Am. St. Rep. 786-790.

DAGGETT, BASSETT, AND HILL COMPANY v. BULFER.

[82 IOWA, 101.]

FRAUDULENT CONVEYANCES — CONVEYANCE BY HUSBAND TO WIFE VALUED AS AGAINST SUBSEQUENT CREDITOR WHEN. — When a husband pays his wife one hundred dollars a year for services rendered by her, and in consideration of the loan by her to him of the sum so paid, and of other property given to her by her relatives, makes to her a conveyance of property, such conveyance will be valid as against a subsequent creditor.

ACTION to set aside a deed of land as fraudulent. On September 5, 1887, the plaintiff recovered a judgment, in Marshall County, Iowa, against the defendant, John C. Bulfer, upon transcripts of judgments obtained in the state of Nebraska, for goods sold by the plaintiff in February and April, 1887. The defendants are husband and wife, and have resided in Nebraska since October, 1886. Prior to December 31, 1886, John C. Bulfer owned a lot in the town of Laurel, Marshall County, Iowa, and on that day conveyed it to his wife, Bertha Bulfer, the other defendant, and at the same time assigned to her a lease thereof, under which she claimed to be entitled to the rents and profits. This action was brought to set aside this deed as made in fraud of the rights of his creditors; and by a consolidation of another cause with it, the proceeding also involved the grantee's right to the rents and profits of the premises. The district court sustained the conveyance and the assignment of the lease, and rendered judgment for the defendants, from which the plaintiff appealed. Other facts are stated in the opinion.

Brown and Miller, for the appellants.

J. L. Carney, for the appellees.

GRANGER, J. The deed from Bulfer to his wife was made December 31, 1886, in Nebraska, and was at once sent to Marshall County, and filed for record January 3, 1887. There was no secrecy in the act of conveyance. The debt, which is the basis for plaintiff's judgment, was not then in existence, nor was it thereafter till February 8, 1887, when a part of it was contracted, and the remainder in April thereafter. To our minds it is clear, from the record, that when the transfers were made, on the thirty-first day of December, there was no purpose to defraud the then existing creditors of John C. Bulfer. He had before been in partnership in mercantile business with his brother Philipp, and in December had bought Philipp's interest, mainly on credit; and while it is

true the business had not been conducted as between them on strictly business-like principles, as to this transaction we do not understand that fraud is claimed. Very soon after, one Fannon became and was a partner with John C. till in June, when the firm became involved in trouble, and Fannon retired, and the business was closed by attachment. It was at this time that the Nebraska judgments, on which the judgment in this state was obtained, were rendered upon confession. Up to this time we do not discover any facts indicating a purpose on the part of John C. Bulfer to place property beyond the reach of his creditors. To our minds, the conduct and management of his business were inconsistent with such a purpose. It is more in harmony with the record to say he was wanting in business capacity and shrewdness. But for the fact that the transfer is based on a consideration of an indebtedness by the husband to the wife, the claim of fraud would be without any support. We have no doubt that the purpose in making the conveyance was to prefer the wife to existing creditors; but such creditors are not before us, and if they were, something more than an intended preference must appear to disturb the transaction: *City Bank v. Wright*, 68 Iowa, 132.

The testimony shows that for some years John C. Bulfer paid to his wife one hundred dollars each year for services, and a point is made that there was no valid obligation to make the payments; that the services were such as were due the husband. We need not determine the liability of the husband for the payment. The testimony shows that it was paid, and when paid, it became the property of the wife, as to all parties except the husband, if not as to him. She afterwards loaned it to him, which made a valid debt. Other property obtained from her father and brother, and furnished to her husband, made the consideration for the transfer. Transactions between husband and wife giving rise to indebtedness, whereby property of the husband may be withheld from creditors, generally excite suspicion, and they should be scrutinized with care. If there were other badges of fraud, we might feel disposed to look with less favor upon the statements as to the *bona fides* of the wife's claim against the husband. These findings of fact are quite conclusive of the case under all lines of authority.

It is claimed in argument that the conveyance was made in anticipation of the indebtedness of plaintiff; but we think

that the claim is not supported as against John C. Bulfer, and there is nothing to implicate his wife in such a purpose. The rule in this respect is stated in *Lyman v. Cessford*, 15 Iowa, 229. The appellant, as we view the record, is mistaken in many essential particulars as to the facts, which mistake has led to much of the discussion.

Our findings of fact accord with those of the district court as indicated in its judgment entry, and with such findings there is no doubtful question of law.

Affirmed.

FRAUDULENT CONVEYANCES — CONVEYANCES BY HUSBAND TO WIFE WHEN VALID AS AGAINST SUBSEQUENT CREDITOR. — A husband may give his wife a deed or mortgage to secure a pre-existing *bona fide* debt owing her, and such conveyance if taken in good faith is not void as to his other creditors: *Ward v. Parlin*, 30 Neb. 376; *Chadbourn v. Gilman*, 64 N. H. 253; note to *Steele v. Ooom*, 20 Am. St. Rep. 715; note to *Driggs etc. Bank v. Norwood*, 7 Am. St. Rep. 83; note to *Henderson v. Henderson*, 19 Am. St. Rep. 657; *Second Nat. Bank v. Merrill*, 81 Wis. 151; 29 Am. St. Rep. 877, and notes; *McAfee v. McAfee*, 28 S. C. 189. Where a wife loaned her husband money which was a part of her separate estate, expressly charging him with it, the husband promising to repay it, and the husband conveys in trust real estate to secure said money, the sale of the land to be made at the beneficiaries' request, no actual fraud appearing, the trust deed is valid, and the wife is entitled to have the same enforced for the payment of her debt: *Leonard v. Smith*, 34 W. Va. 442; see *Clark v. King*, 34 W. Va. 631. The burden of proof is upon the wife to show that she is a *bona fide* purchaser, in a contest between herself and a creditor of the husband over a conveyance made by him to her: *Stevens v. Carson*, 30 Neb. 544.

HOBBS v. IOWA MUTUAL BENEFIT ASSOCIATION.

[33 IOWA, 107.]

LIFE INSURANCE — CERTIFICATE NOT FORFEITED BY SUBSEQUENT CHANGE TO PROHIBITED EMPLOYMENT, WHEN. — When a certificate in a mutual benefit society is issued to a member who was, at the time of its issuance, engaged in a lawful business not prohibited by the by-laws of the association, his subsequent change of occupation to one that is hazardous and prohibited by the by-laws of the association will not have the effect to render the certificate void, when the contract of insurance contains nothing in reference to a change of occupation by a member.

CHANGE IN ARTICLES OF INCORPORATION OF BENEFIT SOCIETY DO NOT AFFECT PREVIOUSLY ISSUED CERTIFICATE, WHEN. — When the original agreement between a mutual benefit association and a holder of a certificate therein contains no provision that he shall be bound by all articles and by-laws that may be adopted by the association, it cannot, by the adoption of new articles of incorporation, create a new condition of forfeiture of the certificate without his consent.

ACTION on a certificate of membership issued by the defendant to Richard Hobbs for the plaintiff's benefit. The jury by direction of the court returned a verdict for the plaintiff, and from the judgment entered thereon the defendant appealed. Other facts are stated in the opinion.

A. H. Stutsman, and Dodge and Dodge, for the appellant.

Powers and Huston, for the appellee.

ROBINSON, J. The defendant is a corporation organized under the laws of this state. On June 22, 1886, it issued to Richard Hobbs, on his application, a certificate of membership, of which the following is a copy:—

"This certificate of membership witnesseth: That Richard Hobbs is a member of division A of the Iowa Mutual Benefit Association, and in consideration thereof, and the future payment of all annual dues and assessments, as provided by the articles of incorporation, which are hereby made a part of this contract, the Iowa Mutual Benefit Association agrees to pay Mrs. Eva Hobbs, his wife, two thousand dollars (\$2,000), said sum to be paid within ninety days after presentation and acceptance of proof of death of said member. If, however, the person named in this certificate continues a member, and be living on the twenty-second day of June, 1892, then the full amount named herein shall become due and payable to the said member within ninety days after identification. . . . This certificate is issued and accepted upon the following expressed conditions: 1. If death occurs within five years, one half of the sum named shall be paid; 2. Application is made a part of this contract; 3. Agree to pay annual dues and assessments within thirty days, etc., or forfeit certificate and membership; 4. Written or printed notices deposited in post-office shall be sufficient; 5. If death occurs before payment, assessment shall be taken from amount due; and 6. Provides for making and filing proof of death."

Richard Hobbs died on July 14, 1889, and proof of his death was duly furnished on the twenty-second day of that month.

1. The defendant denies liability on the certificate in suit, on the alleged ground that the death of Hobbs resulted from his engaging in an employment in violation of the contract of insurance. That contract, in terms, includes the articles of incorporation of defendant, and the application for mem-

bership of Hobbs. The portions of that application material to an examination of the questions presented are as follows:—

"The undersigned desires becoming a member of division A of your association, and securing a certificate of two thousand (\$2,000) dollars, subscribes to the following regulations and conditions of the association: To pay in to the secretary six (6) dollars annually for the next three years, and thereafter half of this amount during the remainder of my life, or term of my certificate. Name, Richard Hobbs. Address, 1305 Corse Street. Born, January 29, 1859. Beneficiary, Mrs. Eva Hobbs. [Employment of Richard Hobbs not given.] It is hereby agreed that the above and foregoing application, with the declarations and statements therein made, shall form the basis of this contract. . . . If death is caused by the applicant's own immorality, dissipation, drunkenness, or violation of any law of the land, or by being engaged in active military service, that then, and in either event, this contract shall become null and void, and all money which shall have been paid shall be forfeited, and the certificate issued to the applicant shall not be binding upon the association.

"Dated June 7, 1886.

[Signed]

"RICHARD HOBBS."

Among the articles of incorporation in force when the certificate was issued was the following:—

"Art. 5, sec. 1. Any person of good health and temperate habits, if not less than fifteen nor more than sixty-five years of age, who is not employed in any extrahazardous business, and who shall have passed satisfactorily the required medical examination made by a physician holding the degree of M. D., may be admitted as a member of this association by the approval of the medical directors and executive committee."

One of the by-laws of the defendant, also in force at that time, is as follows:—

"By-law number 12. Members are allowed to engage in any lawful occupation, excepting extrahazardous, including in extrahazardous submarine operations, the production of highly inflammable or explosive substances, entering any military or naval service, except the militia when not in active service, brakeman upon freight trains, car-couplers, sailors, or miners underground."

At the time the certificate was issued, Hobbs was a car-sealer, and that fact was known to the defendant; but at the

time of his death he was a car-coupler, and had been so engaged for about three months. While performing his duty as a car-coupler he received an injury which caused his death within a few hours. The appellee contends that Hobbs, in following the occupation of a car-coupler, did not violate his contract of insurance. That portion of the articles of incorporation of defendant which we have set out provides that a person otherwise qualified, "who is not employed in any extrahazardous business," may be admitted as a member of the association.

It is not claimed that the occupation of car-sealer is extrahazardous. It follows, therefore, that Hobbs was qualified, as to his occupation, to become a member of the association, when the contract of insurance was entered into, and that he became a member of the association under a valid agreement. The question is, Did he cease to be such member by reason of his change of employment? By-law number 12 defines the occupation of "car-couplers" as extrahazardous. If it be conceded that the by-law named became a part of the contract of insurance, we have the case of one who, being a member of the association, adopted an occupation which would have disqualified him as an original applicant for membership. The contract of insurance contains nothing in regard to a change of occupation by a member. By-law number 12 allows members to engage in any lawful occupation which is not hazardous, but does not state the effect which shall follow their engaging in one which is hazardous. It will not do to say that hazardous occupations are forbidden by necessary implication, and therefore that the forfeiture of the certificate must follow the adoption of such an occupation, for the reason that the certificate and application specify the conditions on which the contract shall become void, and the adoption of a hazardous occupation is not one of them. The parties have considered that subject, and it must be presumed that all the conditions of forfeiture upon which they agreed are set out, in terms, in the various instruments which constitute their agreement. Moreover, if the interest of the parties were in doubt, we should incline to adopt that interpretation of their agreement which would sustain it, rather than one which would declare it void by reason of a violation of its provisions. In our opinion, the change of occupation in question did not have the effect, under the by-law specified, to render the certificate void. See *Sanford v. California F. M. F. I. Ass'n*, 63 Cal. 547.

2. On November 2, 1886, the defendant adopted an article of incorporation, of which the following is a copy: "Members of this association are allowed to engage in any lawful occupation except extrahazardous, which shall include submarine operations, the production of highly inflammable or explosive substances, serving in the military or naval service, except the militia when not in active service, braking upon freight trains, coupling cars, serving as a sailor, or coal mining while underground, and the association shall not be liable to any person by reason of any injury or death caused by or resulting from any violation of this article." It will be noticed that this article was adopted after the certificate in suit was issued. The appellant contends that it was binding upon Hobbs, and became a part of his contract.

The members of a mutual insurance company are presumed to have knowledge of the articles of incorporation and by-laws of the company: *Walsh v. Aetna Life Ins. Co.*, 30 Iowa, 183; 6 Am. Rep. 664; *Simeral v. Dubuque etc. Ins. Co.*, 18 Iowa, 319. But it does not follow that they will be bound by all those adopted after their contracts of membership are made. Whether they will be or not, will depend upon the terms of their contract. If that provide that members shall be bound by all articles and by-laws which may at any time be adopted, we know of no reason why it is not valid. In such cases, changes made are not in violation of the contract, but are in harmony with it. But this is not a case of that kind. We look in vain for anything in the original agreement which, in terms or by implication, authorized any material change in its provisions or conditions. Hobbs was qualified to enter into it. The conditions on which the rights it conferred upon the beneficiary should be forfeited were stated, and we think the defendant had no right to alter them at will. The business of a car-sealer requires the person who follows it to be about the railway cars, and at times it may lead him into places of danger. The business was not hazardous within the meaning of the agreement when it was made, but if the claim of appellant be true, it had the power to declare it so afterwards, and to forfeit the agreement by so doing; and yet the fact that he was engaged in that business may have been the principal inducement for the assured to have entered into the agreement. It is true that defendant is a mutual association, and that under its articles of incorporation, Hobbs had the right to cast two votes at its annual meet-

ings; but that fact did not make his agreement subject to change at the pleasure of the association. It is said that the article under consideration imposed upon Hobbs the observance of no duty which he was not bound to observe before its adoption; that it in no way impaired any vested right; that it in no way conflicts with the laws of the association as they existed at the time he became a member; that, as it was made a part of the organic law of the association, he must be held to have assented thereto; that there is a distinction between articles of incorporation and by-laws; and that although vested rights may not be disturbed by the adoption of by-laws, they may be by the adoption of articles of incorporation, for the reason that they are adopted, not by the directors, but by the members. We do not think these claims of the appellant are in all respects well founded. As we have already said, the article in question, if applied to the certificate in suit, would have the effect to create a new condition of forfeiture without the consent of Hobbs. As a member of the association, he may have been bound by the article as applied to agreements made after its adoption, but not to the one he had already made. As applied to that it would destroy his vested right to follow the occupation of a car-coupler, without defeating the right of the beneficiary of the certificate to recover upon it,

Appellant relies upon the cases of *Supreme Commandery v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332, and *Korn v. Mut. Assur. Soc.*, 6 Cranch, 192, especially the former. But we think the first case will be found, on careful examination, to sustain the conclusions we have announced. The corporation in that case had issued a certificate, upon condition that the person to whom it was issued should comply with the "general laws of the order then in existence, or which might thereafter be enacted." The certificate was accepted in writing by the assured, subject to the laws then in force, or which might thereafter be enacted. The certificate recited on its face that any violation of "the requirements of the laws now in force, or hereafter enacted, governing the order or this class, shall render this certificate null and void." Also that a condition, upon which the obligation of the certificate depends, was "the full compliance with all the laws of the order now in force, or that may hereafter be enacted." Subsequent to the issuance of the certificate, a law was adopted, by the terms of which a certificate of that class was forfeited, if the member, whether sane or insane, should take his own life. The

court held that the parties to the certificate intended that it should be subject to the laws of the association adopted subsequent to its issue. But the court said that "a corporation has no capacity, as the legislative power from which it derives existence has no competency, by laws of its own enactment, to disturb or divest rights which it had created, or to impair the obligation of its contracts, or to change its responsibilities to its members, or to draw them into new and distinct relations."

In *Korn v. Mut. Assur. Soc.*, 6 Cranch, 192, it appeared that the members of the society had signed an obligation to adhere to the constitution, rules, and regulations which were already established, or which might thereafter be established. We conclude that the article adopted in November, 1886, did not become a part of the contract upon which this action is based. See *Morrison v. Wisconsin etc. Ins. Co.*, 59 Wis. 162. The evidence failed to show that there was any forfeiture of the certificate, and as there was no dispute as to the material facts, the court properly directed a verdict for the plaintiff.

The conclusions announced make it unnecessary to decide other questions discussed by counsel.

The judgment of the district court is affirmed.

LIFE INSURANCE — CHANGE OF OCCUPATION. — The word "occupation," when found in the by-laws or policies of insurance companies, has reference to the vocation which the insured is engaged in for profit, and not as precluding him from the performance of acts and duties connected with the life of men of all occupations: *Union etc. Accident Ass'n v. Frohard*, 134 Ill. 228; 23 Am. St. Rep. 664, and note; see note to *North American etc. Ins. Co. v. Burroughs*, 8 Am. Rep. 218.

MUTUAL BENEFIT SOCIETIES — CHANGE OF BY-LAWS. — Mutual benefit societies have the right to alter or amend their by-laws, or enact others consistent with the purpose of their organization, but they cannot so exercise this right as to repudiate their obligations or work a forfeiture of rights previously vested in their members: *West v. Grand Lodge*, 22 Or. 271; 23 Am. St. Rep. 803.

BOWMAN v. ANDERSON. PERCELL, INTERVENER.

[22 IOWA, 218.]

POSSESSION OF REAL ESTATE CONSTRUCTIVE NOTICE OF TITLE, WHEN. —

Actual visible possession of real estate by a tenant is constructive notice of the title of the landlord. When, therefore, the person holding the legal title to a lot of land in trust for another person conveys the property while it is in the actual visible possession of a tenant of the beneficiary, the grantee takes with constructive notice of the right and title of the beneficiary, and of the contingent dower interest of his wife, and a person to whom such grantee mortgages the property, at the time of the conveyance, is affected with like notice. The mortgagor, not being an innocent purchaser without notice, but a purchaser with constructive notice of the dower interest, does not acquire that interest by the conveyance, and cannot convey by the mortgage what he does not own, and the mortgagee is not entitled to a foreclosure of the mortgage as against the dower interest.

LIT PENDENS, ASSIGNEE OF MORTGAGE CHARGEABLE WITH NOTICE OF. —

An assignee of a mortgage is chargeable with notice of an action pending at the time the assignment is made, and which affects the interest conveyed by the mortgage.

ACTION on a promissory note, and for the foreclosure of a mortgage given to secure it. The intervener claimed an interest in part of the lands as superior to the mortgage. A decree was entered for the plaintiff, and the intervener appealed.

H. B. Hendershot, and McNett and Tisdale, for the appellant.

Wilson and Hinkle, M. A. McCord, J. B. McCoy, and W. G. R. Talley, for the appellees.

GIVEN, J. The facts in this case appear with but little conflict, and are, in substance, as follows: "On and for some time prior to December 13, 1881, M. M. L. McReynolds held the legal title to a certain undivided fractional part of the north-west quarter of section 23, township 73, range 11, Jefferson County, in trust for his father, Solomon McReynolds. M. M. L. McReynolds sold, and on December 13, 1881, conveyed, said interest to the defendant. The defendant, having purchased the other interest in said land from Matilda Gaston, did on the same day execute his mortgage thereon, and upon other land, in which his wife joined, to John N. Halferty, to secure his note to Halferty for twenty-five hundred dollars for borrowed money due two years after date, part, if not all, of which money was paid to M. M. L. McReynolds on the purchase. Solomon McReynolds died July 11, 1882, leaving Eliza McReynolds, his wife, surviving him. On August 19,

1882, Eliza McReynolds commenced an action in the circuit court of Jefferson County against this defendant, Andrew Anderson, by placing an original notice in the hands of the sheriff for service, and filing her petition claiming dower as widow of Solomon McReynolds in such fractional part of said land. The defendant Anderson answered said petition, and such proceedings were had that on the sixth day of February, 1885, decree was entered in favor of Eliza McReynolds for one third of said fractional interest as dower, which decree was affirmed on appeal: *McReynolds v. Anderson*, 69 Iowa, 208. On October 29, 1885, Eliza McReynolds conveyed her interest in said land to this intervener. On November 11, 1882, John N. Halferty, for value received, assigned the note and mortgage sued upon, by written indorsement thereon, to this plaintiff. The land in question was all inclosed and under cultivation. Joseph J. Burnaugh was in possession from March 1, 1881, to March 1, 1882. Anderson claims that Burnaugh was in possession as tenant of Solomon McReynolds, and that he (Anderson) took possession immediately after his purchase, and before the conveyance to him. The weight of the testimony is against these claims. We are satisfied that Burnaugh was in possession as the tenant of Solomon McReynolds, under a written lease from him, and that he remained in the full and exclusive possession until March 1, 1882.

We have seen that Burnaugh was in actual and visible possession of the entire farm as the tenant of Solomon McReynolds at the time the deed was made to Anderson, and at the time of the execution of the mortgage from Anderson to the plaintiff's assignor, Halferty. We may add that Anderson knew of Burnaugh's possession, but it does not appear that he knew it was as tenant of Solomon McReynolds. He testifies that he understood he was in possession as tenant of M. M. L. McReynolds. There is nothing to show that Halferty had any actual knowledge as to who was in possession, or under whom. In *Dickey v. Lyon*, 19 Iowa, 545, it is held that actual visible possession of real estate by a tenant is constructive notice of the title of the landlord. This case has been followed in *Nelson v. Wade*, 21 Iowa, 49, and *Phillips v. Blair*, 38 Iowa, 649. Following these cases, we must hold that both Anderson and Halferty had constructive notice of the right and title of Solomon McReynolds, and of the contingent dower interests of his wife, at the time of the deed to

Anderson, and of the mortgage from Anderson to Halferty. It is true, the title of record was in M. M. L. McReynolds, and the lease to Burnaugh was not recorded, but it was the possession, and not the record, that put these purchasers upon inquiry. Anderson was not, therefore, an innocent purchaser without notice, but a purchaser with constructive notice of the dower interest. He did not acquire that interest by the conveyance, and certainly could not convey by mortgage what he did not own. Halferty was not an innocent purchaser without notice, and therefore took subject to the contingent dower interest of Eliza McReynolds. It follows from these conclusions that Halferty would not be entitled to a foreclosure of the mortgage as against the interest in the land now owned by the intervener.

2. Several reasons suggest themselves from the record why this plaintiff is not entitled to foreclosure as against intervenor's interest. It is not apparent why he should be entitled to any greater relief than would be due to his assignor. His assignor could not transfer to him that which he did not own. We have seen that Halferty did not acquire a lien by his mortgage as against the interest owned by the intervener, and hence could not assign the same.

It is claimed that the plaintiff had actual notice of the pendency of the action of Eliza McReynolds against Andrew Anderson at the time he took the assignment of the note and mortgage. We think the testimony fails to sustain this claim, but does show that that action was pending at the time the plaintiff took the assignment. The plaintiff claims that by the assignment he acquired an interest in the real estate claimed by the intervener. As that assignment was taken pending the action to establish the dower interest, and was against that title, the plaintiff was charged with notice of the action, and barred from acquiring any interest as against the plaintiff's title, by the provisions of section 2628 of the code.

The appellee contends that he is indorsee of the note in good faith before maturity, for value and without notice of any defense thereto, and therefore holds the same free from infirmities that might have been urged against it in the hands of the indorser. The fault of this position is in assuming that he took it without notice of the defense that is now being urged, for, as we have seen, he was charged with notice of the pendency of the action against Anderson. The appellee also insists that, as there is no defense to the note, and the mortgage is a

mere incident, though inseparable, and follows the note, no defense can be urged as against the mortgage that does not go to the note. A single illustration will show the fallacy of this position. "A executes his note to B for a valuable consideration, and gives a mortgage on lands belonging to C. B indorses the note and mortgage, and the indorsee brings suit for judgment and foreclosure against A, who has no defense whatever to the note. Can it be said that C may not protect his title to the mortgaged premises by showing that A had no title or authority to mortgage the same, simply because he has no reason to urge why judgment should not be entered on the note against A?"

3. Numerous objections to evidence were made by each party, all of which involved more or less directly the questions already considered, and therefore need not be noticed more in detail. The foregoing discussion leads us to the conclusion that the decree of the district court should be reversed in so far as it holds plaintiff's mortgage superior to the title and interest of the intervener.

Reversed.

VENDOR AND PURCHASER.—POSSESSION OF REALTY AS NOTICE OF TITLE.—One who purchases an estate in the possession of another is bound to inquire what estate he holds: *James v. Morey*, 2 Cow. 246; 14 Am. Dec. 475; *Hood v. Fahnestock*, 1 Pa. St. 470; 44 Am. Dec. 147, and note. The possession of a tenant is notice to a purchaser of the reversion, of the actual interest of the tenant, and of the whole extent of that interest, and he is bound to admit every claim the tenant could enforce against the vendor: *Chesterman v. Gardner*, 5 Johns. 29; 9 Am. Dec. 265. Actual possession by a beneficiary of lands is notice of the trust to a purchaser: *Pritchard v. Brown*, 4 N. H. 397; 17 Am. Dec. 431, and note. For a general discussion of possession of real estate as notice of title, see *Elliot v. Lane*, 32 Iowa, 484, post, p. 504.

LIS PENDENS.—NOTICE OF, ON WHOM BINDING: See note to *Parker v. Connor*, 45 Am. Rep. 187; extended note to *Newman v. Chapman*, 14 Am. Dec. 775, 776. *Lis pendens* is constructive notice to purchasers of all equities arising out of the subject of the litigation: *Lockwood v. Biles*, 1 Del. Ch. 435; 12 Am. Dec. 121, and note; *Puckett v. Benjamin*, 21 Or. 370; *Powell v. Campbell*, 20 Nev. 232; 19 Am. St. Rep. 350. A purchaser *pendente lite* is chargeable with notice of the allegations of a bill in equity relating to the subject-matter of the purchase: *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655; 25 Am. St. Rep. 401, and note.

BURLINGTON, CEDAR RAPIDS, AND NORTHERN RAILWAY COMPANY v. DEY.

[82 IOWA, 512.]

RAILROADS—THROUGH JOINT RATES DEFINED.—The "through joint rates" required by chapter 17 of the acts of the twenty-third general assembly of Iowa to be established are joint rates of charges for the transportation of freight and cars over a united route. They consist of the separate rates of each separate road, and cover all the charges for the transportation over two or more roads, as though they constituted one road, the rates fixed determining the whole charges.

JOINT RATES FOR TRANSPORTATION OF FREIGHT, STATE HAS POWER TO ESTABLISH.—A state which has power to fix the maximum charges for the transportation of freight by railroads, provided such charges shall not be unreasonable, has also authority and power to establish joint through rates, and an act of the legislature providing that all railway companies within the state shall, upon the demand of any person interested, establish joint through rates for the transportation of freight and cars between points on their respective lines within the state, and making it the duty of the board of state railroad commissioners, in case of a railroad company's failure to do so, to establish such joint through rates, is not unconstitutional.

STATUTE PROVIDING FOR TRANSFER OF RAILROAD CARS NOT UNCONSTITUTIONAL.—The custom of transferring cars from one railroad company to another, for the transportation of property over more than one railroad, without breaking bulk, has been practiced so long as to be recognized as of the course of business of which the courts will take judicial notice, and an act of the legislature providing that car-load lots of freight shall be transferred without unloading, unless done without charge to the shipper or receiver of such shipments, and making it the duty of the state railroad commissioners to aid the railroad companies in the matter by making and enforcing proper rules for the compensation of the companies for the use of the cars so transferred, and for their ultimate return, does not interfere with the constitutional guaranties for the protection of the rights and property of such companies. Such an enactment is a legitimate exercise of the legislative authority to regulate the performance of duty by carriers, and to prescribe reasonable charges for the transportation of freight.

DUE PROCESS OF LAW, PROVIDED BY ACT AUTHORIZING ESTABLISHMENT OF JOINT RATES OF TRANSPORTATION.—A statute conferring upon a state board of railroad commissioners authority to establish joint through rates for the transportation of freight, after notice to the railroad companies to be affected thereby, and an opportunity to be heard, does not operate to deprive such railroad companies of their property without due process of law. Special proceedings applicable to specified subject-matter, and conformable to the rules requiring notice and the acquisition of jurisdiction, and which affect all persons alike whose property or rights come within the lawful scope of the proceedings, are prosecuted with due process of law.

RULES OF EVIDENCE—POWER OF STATE TO PRESCRIBE IN ALL PROCEEDINGS.—A statute authorizing railroad commissioners to establish joint rates

of transportation which shall be regarded as *prima facie* reasonable does not confer upon such commissioners judicial functions, but simply prescribes a rule of evidence. It does not prevent the companies from having the acts of the commissioners in fixing rates of charges reviewed in the courts of the state.

ATTORNEY'S FEES, RECOVERY OF, MAY BE PERMITTED IN ONE CLASS OF CASES AND DENIED IN OTHERS. — The legislature may prescribe rules permitting the recovery of attorney's fees in one class of cases and deny it in all others. A statute which permits the plaintiff, in an action against a railroad company for a violation of its provisions, to recover, in addition to the damages therein provided for, an attorney's fee, confers no special privilege prohibited by the constitution, nor can it be regarded as imposing a penalty for exercising the right of defense.

STATUTE NOT VOID FOR UNCERTAINTY WHEN. — An amendatory act is not void for uncertainty in not defining offenses for which it imposes penalties, when the act which it amends explicitly defines such offenses.

FINE NOT EXCESSIVE WITHIN MEANING OF CONSTITUTION, WHEN. — A fine of not less than one thousand dollars nor more than five thousand dollars for a first violation of any of the provisions of a statute providing for the establishment of joint through rates of transportation upon railroads, and of not less than five thousand dollars nor more than ten thousand dollars for a subsequent violation thereof, is not excessive within the meaning of the constitution of Iowa.

CONSTRUCTION OF STATUTE. — Where one statute is amendatory of another the two should be read together, and if one construction gives effect to the amendatory act while another construction would defeat it, the former construction should be adopted.

STATUTES UPHOLD UNLESS PLAINLY UNCONSTITUTIONAL. — Courts will uphold statutes unless they are so plainly and palpably in conflict with the constitution as to leave no doubt or hesitation in the judicial mind as to their invalidity.

DEMURRER, STATEMENT IN PLEADING NOT ADMITTED BY, WHEN. — When a statement in a pleading demurred to is a mere conclusion based upon another conclusion, and does not amount to an allegation of facts, its truth is not admitted by the demurrer.

DISSOLUTION OF INJUNCTION NOT IN DISCRETION OF COURT, WHEN. — Where the dissolution of an injunction involves the determination of questions of law arising upon the face of the petition, the supreme court will not defer to the discretion of the trial court in refusing to dissolve the injunction. If it appears upon the face of the pleadings that, as a matter of law, the injunction ought not to have been granted, it will dissolve it.

INJUNCTION DISSOLVED WITHOUT ANSWER, WHEN. — When the issues raised on a motion to dissolve an injunction are all issues of law, and not of fact, the injunction may be dissolved, although the facts alleged in the petition have not been denied by answer.

JUSTICE AND POLICY OF STATUTES NOT MATTERS OF JUDICIAL CONSIDERATION. — The justice and policy of a statute are not matters for judicial consideration. They are for the consideration of the legislative department of the government alone.

ACTION for an injunction. An injunction was allowed upon the petition before it was filed. After the filing of the petition

the defendants moved to dissolve. The motion was overruled, and the defendants appealed.

John Y. Stone, for the appellants.

A. K. Tracy, John C. Bills, A. E. Swisher, T. S. Wright, and J. W. Bythe, for the appellee.

BECK, C. J. 1. In view of the facts that the motion to dissolve the injunction operates as a demurrer to the petition, and that the decision thereon is for review in this case, it becomes necessary to set out fully the pleadings upon which the decision was made. They are as follows:—

“Petition in equity. Your petitioner, the Burlington, Cedar Rapids, and Northern Railway Company of Iowa, a corporation duly organized and existing under and by virtue of the laws of Iowa, complains and says: That defendants, Peter A. Dey, Spencer Smith, and F. T. Campbell, compose the board of railroad commissioners of the state of Iowa; that under and by virtue of chapter 28 of the acts of the twenty-second general assembly, authority is given to said board to fix, establish, and publish reasonable maximum rates of charges for the transportation of freight upon railroads within said state; that a schedule of rates has been adopted by said board for petitioner, which was by it duly accepted and adopted as reasonable and just.

“Your petitioner would now further show that by the act of the twenty-third general assembly, entitled ‘An act to amend chapter 28 of the acts of the twenty-second general assembly, giving authority for the making of rates for transportation of freight and cars over two or more lines of railroad within this state, and enlarging the powers and further defining the duties of the board of railroad commissioners,’ a copy of which act is attached hereto and made part hereof, it is provided that all railway companies doing business in this state, upon the demand of any person, shall establish joint rates for the transportation of freight between points on their respective lines, and shall receive and transport freight and cars over such routes as the shipper shall direct. It is further provided by said chapter 28 of the acts of the twenty-second general assembly, that when the rates for transportation charges are fixed by the board of railroad commissioners, such rates shall, in all suits brought against any railroad company, wherein is in any way involved the charges of such railroad for the transportation of freight, be deemed and taken in all

courts of this state as *prima facie* evidence that the rate thus fixed is a reasonable and just charge for the transportation of freight and cars upon such roads, and that any greater charge shall be deemed extortion. And it is further provided in said chapter 28 of the acts of the twenty-second general assembly, that for violating the charges or rates thus fixed by the board, the penalty therefor is to forfeit and pay to the state of Iowa not less than one thousand dollars (\$1,000) nor more than five thousand dollars (\$5,000) for the first offense, and not less than five thousand dollars (\$5,000) nor more than ten thousand dollars (\$10,000) for every subsequent offense, to be recovered in a civil action, by ordinary proceedings, in the name of the state of Iowa.

"Your petitioner would now further inform your honor that several demands have been sent to it under the last act, or joint-rate law, demanding that it shall make joint rates with other railroads, as is in said act contemplated; that your petitioner has refused to make such joint rates upon such requests, and still does refuse to make such joint rates with other and distinct railroads; that by said last act of the legislature (known as the 'joint-rate act') it then becomes the duty of the board of railroad commissioners, upon such refusal, and upon application of any person, to establish joint rates between different and connecting roads; that said board has been so requested by interested parties to establish joint rates between petitioner and other railroads, and is about to so do and promulgate the same, and such joint rates will be established and promulgated, unless restrained by order of this court; thus subjecting your petitioner to the heavy penalties referred to in the event of non-complying with the joint rates thus to be established and promulgated.

"Your petitioner now avers that the act of the legislature of Iowa known as the 'joint-rate bill,' a copy of which is attached, marked 'Exhibit A,' is unconstitutional and void, and said commissioners have no right or authority thereunder to fix a joint rate, or promulgate the same; that said act deprives your petitioner of its rights guaranteed by section 9, article 1, of the constitution of Iowa, in that it deprives your petitioner of its property, and the right to contract, and deprives it of liberty, without due process of law, and prevents its acquiring, possessing, and protecting its property as guaranteed by section 1 of article 1 of the constitution of Iowa, and by like powers of the constitution of the United States;

that if defendants are allowed and permitted to establish and promulgate such joint rates, although the same will be void for the reasons stated, yet thereunder your petitioner will be subjected to a multiplicity of suits, by many different persons, to recover the penalties referred to, and otherwise harassed by vexatious litigation.

"To the end, therefore, that your petitioner may obtain the relief to which it is justly entitled in the premises, and being remediless at law, it now prays the court to grant it a temporary writ of injunction, restraining defendants, and each of them, and as the board of railroad commissioners, from establishing and promulgating joint rates with it in connection with other railroads, for the shipment of freight and cars over such different railroads, and that upon a final hearing it be ordered and decreed that defendants be permanently enjoined from establishing such joint rates. And further, your petitioner prays for such other and further relief as may be just and equitable."

"EXHIBIT A.

"An act to amend chapter 28 of the acts of the twenty-second general assembly, giving authority for the making of rates for the transportation of freight and cars over two or more lines of railroad within this state, and enlarging the powers and further defining the duties of the board of railroad commissioners.

"Be it enacted by the general assembly of the state of Iowa:—

"Sec. 1. That chapter 28 of the acts of the twenty-second general assembly be, and the same is hereby, amended as follows: That said chapter 28 of the twenty-second general assembly shall be construed to prohibit the making of rates by two or more railroad companies for the transportation of property over two or more of their respective lines of railroad within this state, and a less charge by each of said railroad companies for its portion of such joint shipment than it charges for a shipment for the same distance wholly over its own line within the state shall not be considered a violation of said chapter 28 of the acts of the twenty-second general assembly, and shall not render such railroad company liable to any of the penalties of said act. But the provision of this section shall not be construed to permit railway companies establishing joint rates to make, by such joint rates, any unjust discrimination between the different shipping points or stations

upon the respective lines between which joint rates are established. Any such unjust discrimination shall be punished in the manner and by the same penalties provided in chapter 28 of the acts of the twenty-second general assembly.

“Sec. 2. All railway companies doing business in this state shall, upon the demand of any person or persons interested, establish reasonable joint through rates for the transportation of freight between points on their respective lines within this state, and shall receive and transport freight and cars over such route or routes as the shipper shall direct. Car-load lots shall be transferred without unloading from the cars in which such shipments were first made, unless such unloading in other cars shall be done without charge therefor to the shipper or receiver of such car-load lots, and such transfer be made without unreasonable delay; and less than car-load lots shall be transferred into the connecting railway's cars at cost, which shall be included in and made a part of the joint rate adopted by such railway companies, or established as provided by this act. When shipments of freight to be transported between different points within this state are required to be carried by two or more railway companies operating connecting lines, such railway companies shall transport the same at reasonable through rates, and shall at all times give the same facilities and accommodation to local or state traffic as they give to interstate traffic over their lines of road.

“Sec. 3. In the event that said railway companies fail to establish through joint rates, or fail to establish and charge reasonable rates for such through shipments, it shall be the duty of the board of railroad commissioners, and they are hereby directed, upon the application of any person or persons interested, to establish joint rates for the shipment of freight and cars over the two or more connecting lines of railroad in this state; and in the making of such rates, and in changing or revising the same, they shall be governed, as near as may be, by all the provisions of chapter 28 of the acts of the twenty-second general assembly, and shall take into consideration the average of rates charged by said railway companies for shipments within this state or like distances over their respective lines, and rates charged by the railway companies operating such connecting lines for joint interstate shipments for like distances. The rates established by the board of railroad commissioners shall go into effect within ten days after the same are promulgated by said board, and from and after

that time the schedule of such rates shall be *prima facie* evidence in all of the courts of this state of the joint transportation of freight and cars upon the railroads for which such schedules have been fixed.

"Sec. 4. Before the promulgation of such rates as provided in section 3 of this act, the board of railroad commissioners shall notify the railroad companies interested in the schedule of joint rates fixed by them, and they shall give said railroad companies a reasonable time thereafter to agree upon a division of the charges provided for in such schedule; and in the event of the failure of said railroad companies to agree upon such a division, and to notify the board of such agreement, the board of railroad commissioners shall, after a hearing of the companies interested, decide the same, taking into consideration the value of terminal facilities, and all the circumstances of the haul; and the division so determined by the board shall, in all controversies or suits between the railroad companies interested, be *prima facie* evidence of a just and reasonable division of such charges.

"Sec. 5. Every unjust and unreasonable charge for the transportation of freight and cars over two or more railroads in this state is hereby prohibited, and declared to be unlawful, and each and every one of the companies making such unreasonable and unlawful charges, or otherwise violating the provisions of this act, shall be punished as provided in chapter 28 of the acts of the twenty-second general assembly for the making of unreasonable charges for the transportation of freight and cars over a single line of railroad by a single railroad company.

"Sec. 6. This act, being deemed of immediate importance, shall take effect and be in force from and after its publication in the Iowa State Register and the Des Moines Leader, newspaper published in the city of Des Moines, Iowa."

Upon the presentation of the motion to dissolve the injunction, the plaintiff filed the following amendment to the petition:—

"Your petitioner, by way of amendment to the original bill filed in this cause, further avers:—

"1. That said act known and referred to as the 'joint-rate bill,' and the act of which it is amendatory, are unconstitutional and void, in this: that under said acts your petitioner is denied the right of a jury trial, and denied due process of law, in the protection and preservation of its property, as guar-

anteed by the ninth section of article 1 of the constitution of the state of Iowa; that its property, or the use thereof, is taken without its consent, and without just compensation, for private and public purposes, and that its right of appeal is so tampered with as to make that right ineffectual; that in the enforcement of any order promulgated by said railroad commissioners, all distinction between law and equitable actions is abolished by said acts, all of which is in direct violation of the sixth section of article 5 of the constitution of the state of Iowa, and which deprives petitioner of that due process of law therein guaranteed.

"2. That said acts are violative of section 8, article 1, of the constitution of the United States, in that it is a regulation of commerce among the several states.

"3. That said acts are void and unconstitutional, because they violate section 17 of article 1 of the constitution of Iowa, by imposing excessive fines and unusual punishment.

"4. That said acts are void and inoperative, because they fail to describe or define the offenses for which the extraordinary penalties are imposed, and impose penalties, by way of attorney's fees, upon railroad companies for making any defense to actions brought under said acts.

"5. That said joint-rate act is violative of the fourteenth amendment of the constitution of the United States, in that it abridges the privileges or immunities of your petitioner as a citizen, denies it equal protection of the laws, and deprives it of its property and the use thereof, without just compensation or due process of law; that by said acts your petitioner is denied the right and liberty of contracting with reference to its business, and thus is its property taken from it without its consent, and it is compelled to enter into involuntary, unreasonable, and unprofitable contracts with other railroad companies at the instance of third parties, compelling the operation of its road at a loss; that in the matter of fixing the joint rates contemplated in said statute, your petitioner is not notified of the time or place when the same are to be fixed by defendants, nor given any opportunity to object to the making of such rates, or to show the unreasonableness of the same; that under said statute, the joint rates, as thus fixed by defendants, are final and absolute, and thus is your petitioner deprived of its property and the use thereof, without due process of law, and deprived of making reasonable and lawful contracts and profits as other citizens are permitted to

do, and hence it is denied that equal protection of the law guaranteed by the constitution of the United States.

"Wherefore your petitioner prays that the temporary writ of injunction issued herein may be continued until the final hearing of this cause, and that upon such final hearing said injunction may be made perpetual; and your petitioner prays for such other and further relief as may be deemed equitable in the premises."

The motion to dissolve the injunction is based upon the ground that the statutes assailed are in harmony with the constitution; that the petition does not show that the plaintiff is entitled to the relief prayed for in the petition; and that the district court has no jurisdiction in the cause, for the reason that it is, in fact, an action against the state, and it is not shown that the state had authorized or consented to the bringing of the suit. Chapter 28, acts twenty-second general assembly, which is amended by chapter 17, acts twenty-third general assembly, contains many sections. They need not be set out, except such as are brought in question or assailed in the argument of counsel. They will be cited or quoted in the discussion of the questions raised thereon.

2. The original act authorizing rates of charges to be fixed by the railroad commissioners (chapter 28, acts twenty-second general assembly) contains this provision:—

"Sec. 17. The board of railroad commissioners of this state are hereby empowered and directed to make, for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of freight and cars on each of said railroads, and said power to make schedules shall include the power of classification of all such freights; and it shall be the duty of said commissioners to make such classifications; provided, that the said rates of charges to be so fixed by said commissioners shall not, in any case, exceed the rates which are or may hereafter be established by law; and said schedules so made by said commissioners shall, in all suits brought against any of such railroad corporations, wherein is in any way involved the charges of any such railroad corporation for the transportation of any freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this state as *prima facie* evidence that the rates therein fixed are reasonable and just maximum rates of charges for the transportation of freight and cars

upon the railroads for which said schedules may have been respectively prepared. Said commissioners shall, from time to time, and as often as circumstances may require, change and revise said schedules, subject to the same provision that the rates fixed are not to be higher than now or hereafter established by law. When any schedule shall have been made or revised as aforesaid, it shall be the duty of said commissioners to cause notice thereof to be published for two successive weeks in some public newspaper published in the city of Des Moines, in this state, which notice shall state the date of the taking effect of said schedule, and said schedule shall take effect at the time so stated in such notice, and a printed copy of said revised schedule shall be conspicuously posted by such common carrier in each freight-office and passenger depot upon its line or lines. All such schedules so made shall be received and held in all such suits as *prima facie* the schedule of said commissioners, without further proof than the production of the schedule desired to be used as evidence, with a certificate of said railroad commissioners that the same is a true copy of the schedule prepared by them for the railroad company or corporation therein named, and that notice of making the same has been published as required by law; provided, that before finally fixing and deciding what the original maximum rates and classification shall be, it shall be the duty of the railroad commissioners to publish ten days' notice in two daily papers published in Des Moines, setting forth in such notice that, at a certain time and place, they will proceed to fix and determine such maximum rates and classification, and they shall, at such time and place, and as soon as practicable, afford to any person, firm, corporation, or common carrier who may desire it, an opportunity to make an explanation or showing, or to furnish information to said commissioners on the subject of determining and fixing such maximum rates and classification; and in any event, the original schedule of rates and classification of freights, on all lines of railroads in Iowa, shall be fixed and go into effect within sixty days from the taking effect of this act."

It will be observed, upon consideration of the plaintiff's petition, that the threatened injury which it seeks to avert by the injunction in this case is the establishing, promulgating, and enforcing of what in the petition are called "joint rates between petitioner and other railroads." It is important that we determine, at the door of this discussion, what are these

"joint rates" the fear of which is the ground of the plaintiff's action. Section 2 of the statute above quoted provides that "all railroad companies doing business in this state shall, upon demand of any person or persons interested, establish reasonable joint through rates for the transportation of freight between points upon their respective lines within the state." Section 8 of the same statute provides that "in the event said railway companies fail to establish through joint rates, or fail to establish reasonable rates for such through shipments, it shall be the duty of the board of railroad commissioners, and they are hereby directed, upon application of any person or persons interested, to establish joint rates for the shipment of freight and cars over two or more lines of railroads in this state." This statute requires the railroad companies to establish "through joint rates," and in default thereof the railroad commissioners are directed to establish such rates. It is plain that the rates required are joint rates of charges for the transportation of freight and cars. See section 17, chapter 28, acts of the twenty-second general assembly, above quoted. And it is equally plain that the joint rates of charges cover all the charges for the transportation over two or more roads, as though they constituted one road, the rates fixed determining the whole charges. It is also plain that these joint rates consist of the separate rates of each separate road. As their services in the transportation of the freight or cars are not always equal, because of differences in the distances of transportation, and for others reasons, the reasonable charges which each ought to make cannot be equal. It will be seen at once that the railroad companies, or the railroad commissioners, when establishing joint through rates, must establish a rate for each road, which, when united, will be "the joint through rates." This is an obvious construction of the statute demanded by its language, "through joint rates" (plural), which the railroad companies and the railroad commissioners are required to establish.

3. The establishing of "through joint rates" is the only duty to be exercised in the discharge of the power conferred upon the railroad commissioners by the sections of the statute just cited, which are the occasion of plaintiff's fears of interference with its rights, whereon this action is founded. The plaintiff does not allege any other ground of action than the threatened establishing of "through joint rates." No other objections to the statutes in question, pertaining to railroads

and rates and joint rates, are made in the petition; none other are before us for consideration. It will be here seen that the statutes under consideration in no way affect the duty, obligations, or rights of the plaintiff as a common carrier, further than is done by the regulation of rates of charges. The law relating to the receipts and delivery of freight to connecting lines, and the obligations and rights of consignors and consignees, and of the railroads, growing out of the relations arising when such connecting lines exist, are not modified, restricted, nor in any way affected by these statutes. In short, the duty of the railroad companies, as to rates and joint rates, is alone affected and regulated by these statutes. These conclusions will be again brought to mind in the further consideration of the case.

4. The considerations just expressed lead to the conclusion that the power and authority vested in the state, under which rates of charges for the transportation of freight by railroads are regulated, may be exercised to establish what are called "joint through rates." That the state may fix the maximum charges for the transportation of freight by railroads, which shall not be unreasonable, is not disputed in this case. It has been so decided by the United States supreme court, and the doctrine has been recognized by this court: *Chicago etc. R. R. Co. v. Iowa*, 94 U. S. 155. In our opinion, no facts or distinctions in principle exist which deprive the state of authority and power to establish "joint through rates," while it may, in the exercise of its constitutional authority, fix rates of freight charges for each separate railroad. When rates, not joint, are fixed, the maximum charges for specified distances, or per mile, are determined for each separate railroad, as shown by this illustration: Freight is shipped from Cedar Rapids to Davenport by the Burlington, Cedar Rapids, and Northern, and the Chicago, Rock Island, and Pacific railroads. The rate of freight charges is fixed by the state from Cedar Rapids to West Liberty, and a separate rate from West Liberty to Davenport. Now, here are two separate rates,—a rate for each road. It is not doubted that the state may fix these rates, and when that is done, the charges for through shipments from Cedar Rapids to Davenport is the sum of the separate rates. The state, in the exercise of its authority, in accord with legislative wisdom, may discover that these separate rates, when united, are too small to compensate the carrier, or too large to do justice to the shipper; that justice

demands such modification of these separate charges that the sum thereof will be reasonable and just, both as to the railroad companies and the shippers. Thereupon the state, for "through shipments" over the two roads, fixes rates of charges for each road. The sum thereof, united, constitutes the lawful charge for freight between Cedar Rapids and Davenport. It clearly appears that the thing done in the one case is the same as in the other. It is simply the fixing of the rate to be charged by each road. No reason can be given why the state should not fix separate rates which should apply to the through shipments between stations of different roads. The authority which will authorize the fixing of rates for each road may be exercised, when there shall be through shipments over separate roads, to enlarge or restrict such separate rates, in order to attain the ends of justice. It will clearly be seen that the words "through joint rates" simply mean rates which shall be just and reasonable charges for the transportation over the united route. As we have said, these united charges must be so apportioned to the separate roads that each shall receive a just and reasonable part of the joint charge. If the joint rate is fixed by the railroad companies, they will determine the part each shall receive. This will be done by the railroad commissioners, in case the railroad companies fail to fix joint rates; and the commissioners will consider matters and circumstances which should affect the division: Acts 23d Gen. Assem., c. 17, sec. 4.

5. The arranging of what is called "joint through rates" is not a thing that is new in the business of railroad transportation. The current history of the country discloses the existence of the practice among railroads to make through shipments of freight without change of cars. Nor is this practice of recent origin. It has existed whenever the business of the roads demanded it. Expedition and economy in transportation induced contracts and arrangements for through shipments between points on connecting roads. It may be that in some cases the managers of the roads refused or failed to enter into such arrangements or contracts, and it may be that in other cases the business of the roads has not been managed wholly in accord with the best interests of the corporations owning them, and with the requirements of the law. But such failure of duty does not establish the right to be exempt therefrom. Surely, the course of business which has been found, by experience of railroad management, to be pro-

motive of economical transportation and increase of business, thereby promoting the interest of the owners of the railroads and the shippers, ought to be pursued; and if the railroad management fail or refuse to pursue it, the state, as it has done in the statutes under consideration, ought to require it to be pursued. This the state can do under the authority it possesses to regulate and control carriers, and provide maximum freight charges.

It will be observed that section 3 of the statute above quoted, providing for joint through rates, contemplates the practice of through shipments, so long existing, and requires the railroad commissioners to consider the charges made for joint interstate shipments, and the rates charged by the railroad companies for shipments within the state. The purpose of the statute is to secure just and reasonable rates for the shippers of this state, and it directs that the practice and course of business of the railroads shall be considered in fixing such rates. It cannot be that the statute in question will operate to the denial of just compensation to the railroad corporations for the transportation of property. It provides that joint rates fixed under the statutes shall be reasonable. The railroad commissioners, it will be presumed, will rightly discharge their duties, and will fix reasonable and just "joint through rates." If these officers fail in their duty, from errors of judgment or from other causes, the railroads may cause their action to be reviewed and corrected.

6. Objections to the statutes are urged in the following language: "We contend, therefore, that the law seeks to compel: 1. That two or more companies shall enter involuntarily into contract relations with each other at the demand of a third person; 2. That one company shall surrender its cars to the possession of another, or unload the contents, without compensation; 3. That at the demand of a third person, companies shall not only part with the possession of their cars, with no provision in the law as to their return or compensation for their use, but shall accept cars of other companies, and carry the same over its lines without any provision for compensation."

The statement of facts in this position is not wholly correct. It is not correct that railroad companies are, under the statute, compelled to enter involuntarily into contract relations with each other. It is true that the statute requires them to enter into the contract for joint rates, thus imposing upon

them the duty so to do; but it does not provide for enforcing the duty by proceedings recognizing a contract between the parties, if that, indeed, could be done; nor does it provide for penalties or forfeitures for failure to discharge the duty. It simply provides that, in case of failure to adopt joint rates by the companies, the railroad commissioners shall prescribe them, and the companies shall not be permitted to charge more. In that case, the charges are not made by the companies under a contract, but pursuant to a duty and obligation imposed by law. It is not necessary, in order to support an action against a railroad company for failure to fix joint rates, to hold that it is bound by an obligation as of a contract. Its liability arises by reason of its failure to perform a duty imposed by law. The statute, in its principle and its effect in this regard, is not different from other rules of the law applicable to common carriers, which hold them liable for failure to receive property for transportation. In both cases the carrier is liable for the non-performance of duty.

7. The course of business of railroad companies, originating in the wants and demands of commerce, requires the cars of one company to be delivered to another for transportation. It is presumed that rules relating to compensation for the cars transported are settled by agreement, or under rules recognized and prevailing in the business of transportation by railroads. At all events, the law provides rules under which this matter of compensation may be settled. It is competent for the railroad commissioners, if it be necessary, to impose rules touching this matter, in order to aid the railroad companies to perform the duty imposed by the statute to provide for joint rates, or to require or enforce the performance of that duty. The fact that the transfer of cars from one company to another, for the transportation of property over more than one railroad without breaking bulk, has been practiced so long as to be recognized as of the course of business of which we will take judicial notice (*Peoria etc. R'y Co. v. Chicago etc. R'y Co.*, 109 Ill. 135; 50 Am. Rep. 605), is a complete answer to the complaints made in the objections under consideration. Surely, a course of business so long pursued, and so extensively prevailing, and demanded by the commerce of this country, cannot, when recognized and required by statute, become so objectionable in principle, so oppressive in operation, as to require the statute to be declared unconstitutional. A railroad company, as a common carrier, is required to

receive and transport freight offered to it for transportation. The reasons upon which this rule is founded impose upon it the obligation to haul cars of other companies brought to it for transportation over its own road: *Peoria etc. R'y Co. v. Chicago etc. R'y Co.*, 109 Ill. 185; 50 Am. Rep. 605. As the course of business of the railroad companies and the rules of law require them to transport the cars of other companies, surely a statute prescribing and enforcing the duty thus imposed cannot be regarded as interfering with the constitutional guaranties for the protection of the rights and property of such companies. The statute under consideration provides that freight in car-load quantities may be transferred, instead of going through to destination without change of cars, the cost of unloading being paid by the company making it: Acts 23d Gen. Assem., c. 17, sec. 2. This provision is intended to excuse the duty to transfer cars upon payment of costs of unloading, and is enacted in the exercise of legislative authority, to regulate the performance of duty by carriers, and prescribe reasonable charges for the transportation of freight.

8. Counsel for the plaintiff maintain, upon many grounds, that the statutes in question are in conflict with both the state and federal constitutions. It is first urged that they impair the obligation of the contract arising under the plaintiff's charter. It has been held by the United States supreme court that railroad corporations are "subject to legislative control as to the rates of fare and freight, unless protected by their charters": *Chicago etc. R. R. Co. v. Iowa*, 94 U. S. 155. This doctrine is recognized by this court. The authority of the state to control rates of freight charges made by railroad companies is not restricted so that it cannot be exercised in fixing the rates to be charged by connecting roads, which are called in the statute "joint through rates." Joint rates, as explained heretofore in this opinion, are simply the sum of separate rates of the respective roads. The railroad commissioners in fixing joint rates, under authority of the state, may make just and reasonable orders for the return of cars, and for compensation for their use, or for hauling them, and they will consider these matters in fixing the separate rates which together make the joint rate. The constitutional objection in this point demands no further consideration.

9. It is urged by the plaintiff's counsel that the statute is in conflict with the fourteenth amendment of the constitution of the United States, "in that, without due process of law,

and without just compensation, it takes away from the corporators funds invested by them upon certain specified trusts, and applies these funds to uses to which the owners never consented." We understand this objection, in effect, to be this: that by the statute the plaintiff or its stockholders are deprived of property without due process of law. The power of the state is exercised through designated officers, the railroad commissioners, by proceedings specially provided to enforce the authority of the state. They are designated by the code special proceedings, in which rights may be established and remedies enforced, and are pursued in many cases: Code, sec. 2504. Railroad corporations acquire lands to be occupied by their roads by special proceedings. Surely, the same character of proceedings may be invoked to enforce the performance by them of lawfully imposed duty. The proceedings provide for notice to the railroad companies, and that they shall be heard in regard to the questions of joint rates: Acts 23d Gen. Assem., c. 17, sec. 4. It is a mistake to suppose that "due process of law" is found only in law or chancery actions. Special proceedings, applicable to specified subject-matter, and conformable to the rules requiring notice and the acquisition of jurisdiction, and which affect all persons alike, whose property or rights come within the lawful scope of the proceedings, are prosecuted with "due process of law": 6 Am. & Eng. Ency. of Law, tit. Due Process of Law. The statutes are designed to prevent railroad corporations from charging unreasonable rates for the transportation of property. Surely, it cannot be claimed that they are deprived of property and property rights by restrictions against unreasonable charges.

In this connection counsel repeat objections founded upon what they term "enforced contractual relations" between the railroad companies. We have shown that these joint through rates are often agreed upon by the railroad companies. They determine, in the common course of business, the division of charges, and where and to whom they shall be paid. Under the statute in question, it is made the duty of the railroad companies to establish joint through rates. If they fail to perform the duty, the railroad commissioners will establish the rates as they should have done, and will do just as they should have done and could have done, — prescribe the time and place of payment, and the division of charges. There will be no more difficulty in obeying the requirements of the

railroad commission than in performing their own agreements for joint through rates, entered into in the course of their business. It is plain that the rights of the plaintiff will not be invaded under this statute, and it will suffer no oppression.

10. It is argued that the statutes are void for the reason the railroad commissioners are not a judicial body, and ought not to be permitted to fix rates which shall be regarded as *prima facie* reasonable. The question of the reasonableness of the rates, it is argued, ought to be judicially determined; and so it can be if the action of the commission is not satisfactory to the railroad company. The provision of the statute that the rates fixed by the commissioners shall be regarded as *prima facie* reasonable is not of an unusual character, and was enacted in the exercise of the undoubted power of the state to prescribe rules of evidence in all proceedings under the laws of the state. The law presumes the acts of officers of the state to be rightly done, and gives them faith accordingly. This rule is not unlike the provision of the statute complained of by the plaintiff. The courts of law and chancery are open to the railroad corporations for proceedings to review the acts of the commissioners in fixing rates of charges.

11. It is urged that the statutes are in conflict with section 8, article 1, of the constitution of the United States, in that it is an attempt to regulate commerce between the states. The position is based upon these alleged facts. The plaintiff's road, in its route between Burlington and Rock Rapids, passes through a part of Minnesota. Trains running between these cities would pass through another state, and therefore counsel conclude shipments between these cities, on these trains, is interstate commerce. We need not determine whether traffic between cities of the same state is merchandise, which, pursuant to the traffic, is transferred from one city of the state to another, by a route partly in another state, by a railway company organized under the laws of the state, which carries the merchandise within the jurisdiction of the other state, is interstate commerce. See, on this question, *Commonwealth v. Lehigh Val. R. R. Co.*, 17 Atl. Rep. 179 (Pa., Oct. 1, 1888), and *State ex rel. v. Chicago etc. R'y Co.*, 40 Minn. 267, 12 Am. St. Rep. 730, recognizing adverse rules, the first maintaining that such a transaction is not interstate commerce. The petition does not allege that defendants are about to fix joint rates between Burlington and Rock Rapids. If it be not lawful for them to do so, we will presume, when

called on to act, they will not fix such a joint through rate. We would not annul a statute on the ground of a fear of its erroneous execution in one particular. Upon the question of law presented by counsel we intimate no opinion.

12. Chapter 28, acts of the twenty-second general assembly, provides, that when recovery is had for its violation, attorney's fees are adjudged against the defendant. It is insisted that a privilege is here granted to a suitor which is withheld from other citizens. All citizens, having litigation of the character indicated, have equal rights to recover attorney's fees. The legislature may prescribe rules permitting recovery of double damages or attorney's fees in one class of cases and deny it in all others. There is no inequality therein forbidden by the constitution and laws.

13. It is insisted that the provision imposes a "penalty for exercising the right of defense." It will be seen that if the defense is established, there can be no penalty; if it be not, it will be rightly imposed.

14. It is urged that the statute is void for uncertainty, in that it does not define the offense for which the penalties provided may be imposed. These offenses are explicitly defined in chapter 28, acts of the twenty-second general assembly, sections 11, 23. It is said that the statute is uncertain, because it does not prescribe what shall constitute a reasonable rate. It declares that the rate fixed by the commission shall be *prima facie* evidence that it is reasonable. But it permits the accused to show in defense that it is not reasonable. The law requires reasonable rates to be charged. What constitutes such rates is a question of fact to be determined under the rules of the law. But it is said that the commissioners' rate would not secure the accused from conviction if it be shown that the charges fixed by the commissioners are excessive,—greater than is reasonable. But the purpose of the provision authorizing the commission to fix rates is to determine a maximum rate, beyond which the railroad company may not charge. It may charge the rate fixed, but no more. In prosecutions to recover penalties for the violation of the statute, the state is precluded from denying that the commissioners' rates are unreasonable.

15. It is urged that the fines imposed by the statutes for its violation are excessive, and forbidden by section 17, article 1, of the state constitution. The fines are intended to enforce obedience to the law by corporations having great incomes

and controlling vast properties. The legislature, in exercise of its wisdom, fixed penalties which, if imposed upon individuals, might appear excessive, but when imposed upon the corporations would be esteemed no greater than is necessary to enforce obedience to the statute. The railroad companies have a ready and efficient way of avoiding these severe penalties, namely, by obeying truly the laws of the state. If they do this, they are in no danger of the penalties; if they do not, they are in no condition to complain of the laws.

16. It is insisted that the rates established under authority conferred by chapter 17, acts of the twenty-third general assembly, are absolute, and upon the questions of their justice and reasonableness, are final and conclusive. The third section confers such authority upon the railroad commissioners. It is insisted that this section fails to provide that the rates shall be only *prima facie* evidence that they are just and reasonable. It is claimed by counsel that the last sentence is unintelligible, — at least so uncertain as to be incapable of construction. It may be assumed, for the purpose of the argument, that this position is correct. It is evident that this section is not wholly in the language used in its enactment by the general assembly; the history of the law supports this conclusion. The act containing the provision is amendatory to chapter 28, acts of the twenty-second general assembly, and confers authority to fix joint through rates, which was not done in the prior statute. That statute provides that the rates fixed by the railroad commissioners shall be *prima facie* evidence that they are just and reasonable. The amendatory statute provides that in making joint rates, and in changing and revising the same, the railroad commissioners shall be governed, as nearly as may be, by all the provisions of the act to which it is amendatory, and that the punishments and penalties provided in the prior act shall be inflicted for the violation of the amendatory act: See secs. 1, 5. No other punishments and penalties are prescribed. It will be observed that section 5, in express language, declares that the punishments and penalties contemplated by the act shall be inflicted for unjust and unreasonable charges. The charges fixed by the railroad commissioners are, under the statute, *prima facie* evidence of their reasonableness. For the violation of the law in charging more than reasonable joint rates as determined by law, punishments and penalties are alone provided. We conclude that, according to the obvious con-

struction of the two statutes, read together, the joint rates are not absolute, but are *prima facie* evidence only of their reasonableness and justice. The construction of the statute we have adopted gives it effect; that insisted upon by the plaintiff would defeat it. We are required, under the familiar rules of the law, the statute being susceptible of conflicting and doubtful construction, to adopt that one which supports the statute in all its parts, and if the statute in some of its provisions be so indefinite, uncertain, or unintelligible as to be incapable of enforcement, or be void because of conflict with the constitution, or for any other reason, we must sustain the statute in all its parts which are not subject to such objections.

17. Another familiar rule of the law requires courts to uphold statutes unless they are so plainly and palpably in conflict with the constitution as to leave no doubt or hesitation in the judicial mind of their invalidity: *Stewart v. Supervisors*, 30 Iowa, 9; 1 Am. Rep. 238; *Central Iowa R'y Co. v. Board of Supervisors*, 67 Iowa, 199; *Gates v. Brooks*, 59 Iowa, 510; *Morrison v. Springer*, 15 Iowa, 304. It cannot be fairly claimed that the statutes in question are plainly and without a doubt unconstitutional.

18. Counsel for the plaintiff insist that the order of the district court, in overruling the motion to dissolve the injunction, must be affirmed on this ground: the motion to dissolve admits the allegations of the petition. It is claimed one of these allegations is, "that joint rates, as contemplated by the statute, would so reduce plaintiff's income as to render its business unremunerative." It is insisted that, upon this admission, it must be held that the statute in question would have the effect to deprive the plaintiff of its property. Without inquiry whether the effect of the statute upon the plaintiff's business, as claimed, would be ground of holding it involved, and enjoining its enforcement, we think the loss of plaintiff's property is not shown in the plaintiff's petition. The language of the petition upon which counsel base the position under consideration is this: "That by said acts your petitioner is denied the right and liberty of contracting with reference to its business, and therefore is its property taken from it without consent, and it is compelled to enter into involuntary, unreasonable, and unprofitable contracts with other railroad companies, at the instance of third parties, compelling the operation of its road at a loss." What is averred

here as to the deprivation of property, and the future operations of the road at a loss, are mere conclusions as to supposed effects. It does not amount to an allegation of facts. It is the mere statement of a conclusion that the road would be operated at a loss because plaintiff would be compelled by the statute to enter into involuntary, unreasonable, and unprofitable contracts. The allegation in question is, indeed, a conclusion based upon another conclusion as to the supposed operations of the statute.

19. It is also insisted, that as the dissolving of an injunction is a matter resting largely in the discretion of the court, the refusal of the court below will not be disturbed, unless it appears such discretion has been abused. But this rule does not apply to cases involving questions of law arising upon the face of the petition itself. If it appear upon the face of the pleadings, that, as a matter of law, the injunction ought not to have been granted, it will be dissolved. Surely, the operations of a statute of a state will not be suspended by injunction for conflict with the constitution, under this doctrine of discretion, when the petition therefor, upon its face, shows that it is constitutional, or that it is not clearly and without doubt unconstitutional. The failure to dissolve the injunction, upon proper motion, was not done in the exercise of judicial discretion. The enforcement and obedience to the rules of law are not left to the discretion of the court.

20. The views just expressed, and the rules upon which they are based, dispose of another position of counsel, namely, that the injunction will not be dissolved on motion, because the facts alleged in the petition are not denied by answer, and that the relief sought will not be effectual if the injunction be not maintained. But there are no issues of fact raised by this motion,—they are all of law. The issues involve the validity of the statutes in question. If they be held valid, no facts are alleged in the petition which will defeat them.

21. Much is said in argument attacking the justice and policy of the statutes. With these things we have nothing to do. They are for the consideration of the legislative department of the government alone.

These views dispose of all questions arising in the case, and lead us to the conclusion that the judgment of the district court ought to be reversed.

ROTHROCK, J. (dissenting). It appears to me that the foregoing opinion is unsound in its reasoning, and wrong in its

conclusions, upon two questions involved in the record in the case. These questions involve the validity of certain provisions found in chapter 17, laws of the twenty-third general assembly. I believe that parts of that act are plainly invalid, and ought not to be upheld by this court; and it is proper to say here that the question as to the power of the legislature to authorize the railroad commissioners to establish and promulgate joint rates for the transportation of freight over connecting lines of railroad is not necessary to be determined in this case. The question is, Does the said act, by reason of its plain language, violate the constitution of the United States and of this state, in so far as it compels a common carrier to perform service without compensation, or to surrender its property to another carrier, and thus deprive it of its property without due process of law?

The first question arises upon the second section of the act. It is therein provided that "car-load lots shall be transferred without unloading from the cars in which such shipments were first made, unless such unloading in other cars shall be done without charge therefor to the shipper or receiver of said car-load lots, and such transfer be made without unreasonable delay." This provision of the law is absolute. It seeks to compel the initial carrier to deliver its loaded cars to the connecting carrier without any rule or regulation for its return, and without its consent, or to unload the contents of the car into other cars without compensation. It is apparent that the initial carrier is compelled by the act to name to the shipper a joint through rate over all lines of road which the shipper may designate. The law attempts to compel the initial carrier, if the freight be paid in advance, to account to all other carriers for their proportion of the charges, or, if the freight be paid to the last carrier, it becomes the agent or collector for all the others. This enforces contractual relations against the will of the parties, and it is no answer to say that it is not in the nature of a contract, but that it is a rule or regulation prescribed by law. It partakes of the nature of a contract, by whatever name it may be called; and the fact that carriers over connecting lines do, by contract, make through shipments is no reason why they should not be allowed to make their own contracts, at least so far as to protect themselves in the collection of their freight charges, and in the control of their cars. They should have this power, or the law should

provide for such regulations as would protect them in their undoubted rights.

The second question is, whether, by the act under consideration, the joint rates fixed by the commissioners are to be regarded as absolute. The last part of section 3 of the act is unintelligible. What is intended thereby cannot be determined without the interpolation of words, so as to give meaning to that which is absolutely unmeaning. I am not aware that any court has ever, under the guise of construction, entered upon the field of legislation to the extent required to hold that the act provides that the schedule of rates shall be *prima facie* evidence that the same are reasonable and just; and the attempt to find ground upon which to hold the act valid, by reference to the act of which it purported to be amendatory, it seems to me is equally unwarranted.

Without elaborating these questions, I conclude that no court ought to be called upon to uphold an act like this, which attempts to control the most important rights without the semblance of an effort to protect the parties affected thereby. In addition to the failure to make the third section intelligible, the second section requires that, if the initial carrier does not deem it prudent to deliver its car to the connecting line for any reason, such as that the car is required to transact its own business, or that it may have to institute legal proceedings to procure its return, the contents shall be unloaded "in other cars" without unreasonable delay. It is to be supposed that this means other cars, the property of the connecting line. It cannot discharge its obligation by unloading in a warehouse, if the connecting carrier neglects to furnish other cars. It appears to me that it will be time enough to authorize the establishment of through rates when a law shall be passed making provision for the protection of the rights of property, which are everywhere and at all times regarded as sacred, and of which the owner cannot be deprived, even by legislative authority, without due process of law.

In my opinion, the order and judgment of the district court should be affirmed.

REGULATION OF CARRIERS' CHARGES BY THE STATE. — The state has a right to regulate tolls, and violates no contract in doing so, although by the acts under which the company was incorporated no express authority to fix rates of transportation was reserved: *Blake v. Winona etc. R. R. Co.*, 19 Minn. 418; 18 Am. Rep. 345; *Norfolk and Western R. R. Co. v. Pendleton*, 86 Va. 1004; *Wellman v. Chicago etc. R. R. Co.*, 83 Mich. 592; *Dow v. Beidel-*

man, 49 Ark. 325; *In re Senate Bill No. 69*, 15 Col. 601. But this power is subject to the limitation that no injustice must be done to the incorporators: *Railway Co. v. Gill*, 54 Ark. 101; and the enforcement of a tariff of freight and passenger rates which will not pay the expenses of operating a railroad is an abuse of discretion on the part of the railroad commissioners: *Pensacola etc. R. R. Co. v. State*, 25 Fla. 310. Under the Michigan constitution, it is held that it is for the legislature, and not for the courts, to determine what are reasonable maximum rates for the transportation of passengers and freight on the different railroads of the state: *Wellman v. Chicago etc. R. R. Co.*, 83 Mich. 592.

COMMISSIONERS' TARIFFS, HOW FAR CONCLUSIVE. — In Minnesota the determination of the railroad commission as to what is a proper tariff is conclusive, and the authority thus given to the commission is held not to be a delegation of legislative power: *State v. Chicago etc. R'y Co.*, 38 Minn. 281. In Nebraska and Florida the schedules of the commission are only *prima facie* evidence of the reasonableness of the charges fixed: *State v. Fremont etc. R. R. Co.*, 23 Neb. 117; *Pensacola etc. R. R. Co. v. State*, 25 Fla. 310.

LEGISLATURE CANNOT PRESCRIBE A RULE OF CONCLUSIVE EVIDENCE: *Little Rock etc. R'y Co. v. Payne*, 33 Ark. 816; 34 Am. Rep. 55; *McCready v. Sexton*, 29 Iowa, 356; 4 Am. Rep. 214; *Maguiar v. Henry*, 84 Ky. 1; 4 Am. St. Rep. 182. The last two cases deny the power of the legislature to make tax deeds conclusive as evidence. But such deeds may be declared presumptive evidence: *People v. Turner*, 117 N. Y. 277; 15 Am. St. Rep. 498.

DUE PROCESS OF LAW: See note to *Bardwell v. Collins*, 20 Am. St. Rep. 554-559.

STATUTES. — WHERE TWO STATUTES ARE SO INCONSISTENT that they cannot stand together, the last repeals the first: *Rawls v. Kennedy*, 23 Ala. 240; 58 Am. Dec. 289; *Edgar v. Greer*, 8 Iowa, 394; 74 Am. Dec. 316.

STATUTES. — PRESUMPTION IN FAVOR OF CONSTITUTIONALITY is always indulged, and if the language employed is capable of two or more constructions, any one of which is in harmony with the constitution, it is the duty of the court to give it that construction: *People v. Hayne*, 83 Cal. 111; 17 Am. St. Rep. 211; *State v. Moore*, 104 N. C. 714; 17 Am. St. Rep. 696.

RICHARDS v. WOLF.

[82 IOWA, 386.]

HIGHWAYS — PRIVATE PROPERTY CANNOT BE TAKEN FOR PRIVATE ROAD. —

A constitutional provision authorizing the taking of private property for public use prohibits, by implication, the taking of private property for any private use whatever without the consent of the owner. The establishment of a highway over the land of one person for the mere convenience of an adjoining owner is, therefore, prohibited by implication by such constitutional provision.

CERTIORARI to set aside an order of the board of supervisors of Webster County, establishing a road over the lands of the plaintiffs. The district court annulled and set aside the proceedings of the board, adjudging, in effect, that it had ex-

ceeded its jurisdiction. The defendants appealed. Other facts appear from the opinion.

Albert E. Clarke, for the appellants.

Theodore Hawley, for the appellees.

ROTHROCK, J. The issue presented by the parties is, whether the road, if established, would be a private or public highway, or in other words, whether the appropriation of the plaintiffs' land for the road in question is the taking of private property for public purposes. It must be conceded, that if the purpose is merely private, the action of the board of supervisors cannot be sustained. Section 18 of article 1 of the constitution authorizes the taking of private property for public use, and this constitutional limitation prohibits, by implication, the taking of private property for any private use whatever without the consent of the owner: *Bankhead v. Brown*, 25 Iowa, 540.

The facts as to the character of the road are, in substance, as follows: A. McBane is the owner of the south half of the northwest quarter of a section of land lying on the west side of the Des Moines River. He also owns a fractional lot between said eighty acres and the river. The plaintiffs own the land adjoining McBane's land on the south, from the river to the west line of the section. There is a public, legally laid-out, and traveled highway on the west line of the section, running from the city of Fort Dodge to Humboldt, in Humboldt County. This road has been open and traveled for twenty years. It runs along the whole of the west line of McBane's land. The dwelling-house on his land is situated about a half a mile from this road. The land of the defendants is inclosed, and used as a pasture, and there is a public road on the south line of their land. The board of supervisors, on the petition of McBane and others, made the order complained of, and thereby attempted to open up a road from the south line of the plaintiffs' land, and running on an angle to the south line of McBane's land, at a point near his dwelling-house. The line of the road runs nearly north through the plaintiffs' land for about forty rods, and then nearly in a northeast direction to its northern terminus.

This is, on its face, essentially a private road. It must have been laid out and established purely for the private convenience of McBane or his tenant on the land. It is agreed and conceded by the parties that the commission appointed

by the board to examine and report upon the expediency of the road took into consideration the convenience of McBane and his tenant only in reporting that the road was necessary and expedient. The appellants rely upon the cases of *Johnson v. Supervisors of Clayton Co.*, 61 Iowa, 89, and *Pagels v. Oaks*, 64 Iowa, 198; but these cases are not in point. They merely determine that, where a party has no access from his land to a public road, the public may properly claim a right to have access to the public by a public road. But in the case at bar, it appears that there is now a public road running along the entire west line of McBane's land. The mere fact that it would be more convenient for him or his tenant to have a public road laid out and established across the plaintiffs' land does not render the use public. He has the right to make a private way over his own land. Besides, the policy generally adopted in this state is to establish public roads on the lines of government subdivisions, where there are no obstacles in the way. But this last consideration would doubtless be within the discretion of the board, and not reviewable by *certiorari*: *Tiedt v. Carstensen*, 61 Iowa, 334.

In the case at bar, it appears from the record and agreed facts that the board acted illegally, and exceeded its authority, and the judgment of the district court is affirmed.

EMINENT DOMAIN — PROPERTY CANNOT BE TAKEN FOR A PRIVATE USE:
See extended note to *Sherman v. Buick*, 91 Am. Dec. 585-589; and the following cases in addition to those cited therein: *Beekman v. Saratoga etc. R. R. Co.*, 3 Paige, 45; 22 Am. Dec. 679; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694; 23 Am. Dec. 756; *Varick v. Smith*, 5 Paige, 137; 23 Am. Dec. 417; *Embury v. Conser*, 3 N. Y. 511; 53 Am. Dec. 325; *Harding v. Goodlett*, 3 Yerg. 40; 24 Am. Dec. 546; *Ten Eyck v. Delaware etc. Canal Co.*, 18 N. J. L. 200; 37 Am. Dec. 233; *Nesbitt v. Trumbo*, 39 Ill. 110; 89 Am. Dec. 290. A strip of land cannot be condemned by a coal company for the construction of a tramway leading from the coal-works to a public railroad: *Sholl v. German Coal Co.*, 118 Ill. 427; 50 Am. Rep. 372.

ELLIOT v. LANE.

[82 IOWA, 484.]

POSSESSION OF LAND TO CONSTITUTE NOTICE MUST BE UNEQUIVOCAL. —

Possession of land necessary to impart notice of title thereto must be adverse, exclusive, open, unequivocal, and notorious, and must be inconsistent with the claim of any other person. The possession of a farm by a woman claiming under an unrecorded deed from her son-in-law, who was, at the date of the conveyance, residing on the farm, and who continued to reside thereon after such date the same as before, exercising authority to some extent over the farm and the business of farming, and with whom the grantee resided as a member of his family, is not, therefore, sufficient to impart notice of title under the deed, even though the grantee generally managed the business of the farm, and sold the produce and stock raised thereon, it not appearing that she exercised exclusive control over it.

ACTION to foreclose a mortgage. Nancy J. Jenks intervened, claiming to hold the title to the land mortgaged under a conveyance to her by the mortgagors, before the mortgage was executed, under which she had continuously held possession of the land. The mortgage was foreclosed, the intervenor's petition dismissed, and she appealed. Other facts appear from the opinion.

Stilwell and Stewart, for the appellant.

D. W. Reed and J. H. Trewin, for the appellee.

BENK, C. J. 1. No question arises on this appeal upon the decree of foreclosure and the judgment against the mortgagors, Lane and wife, further than they would be affected by the intervenor's claim, should it be sustained. The mortgagors do not appeal, and therefore the correctness of the decree of foreclosure and of the judgment, as against them, is not brought in question.

The only questions before us for consideration relate to and involve the intervenor's claim to a large part of the land, which is pleaded in her petition. It is based upon these alleged facts, set out in the petition of intervention: Prior to and at the time of the execution of the mortgage in suit, the intervenor alleges that she was the owner of all the land involved in this suit, except 160 acres, and in possession thereof, and such ownership and possession has continued to the present time. She alleges that she acquired title by a deed of conveyance executed by the mortgagor and wife in 1873, which, however, has never been recorded, but that her possession of the land has been of such a character as to impart

notice to the world of her title and interest therein. The plaintiff maintained that the unrecorded deed under which the intervener claims is shown by the evidence to be a forged instrument, and to have been given without consideration, and never delivered to her. We waive the consideration of these positions of counsel, as it becomes unnecessary, in view of the fact that we reach the conclusion that the decree of the district court ought to be affirmed upon other grounds.

2. In our opinion, the evidence fails to establish such a possession of the land in the intervener as in the law will impart notice of the title acquired by the unrecorded deed. The character of the claim of possession is shown by the following facts, which we find upon the evidence presented in the abstract: The intervener is the mother of the wife of Lane, who is joined with him as a defendant in this action. The land was conveyed in 1871 to Lane by the person then holding the title thereto. In 1872 the unrecorded deed thereto was executed by Lane and wife to the intervener, who at the time was living on the land, which was used as a farm, with Lane and his family. She had no separate possession of the house, but lived in it as one of the family, composed of Lane and his wife and family and herself. They all constituted one family. It appears that Lane gave attention to the business of the farm, and so did the intervener, and she possibly more frequently transacted such business than Lane, as he was often absent transacting business elsewhere. It is claimed, and probably the evidence so shows, that she managed the business of the family, and sold the produce and stock raised on the farm, which was sometimes done by Lane as her agent. But it is not shown that she exercised the exclusive control of the land, and that her possession was of such a character as to be inconsistent with the ownership of the land by Lane. He lived upon the land, and was the head of the family, occupying it as a home, and exercised authority to some extent over the farm and the business of farming. His possession indicated ownership, for it proclaimed that he was the head of the family, and exercised ownership over the land. The possession of the intervener, as shown by the evidence, was manifested by her connection with the farming operations and business, and was wholly consistent with the idea of the ownership of Lane. If the intervener indeed owned the lands, she failed by her conduct to proclaim her ownership, and neglected to fly the flag of her independent

authority, manifested by acts indicating exclusive ownership over her dominions. She thus left the world in ignorance of her claims of right to the lands. The possession of land which will impart notice of title thereto must be adverse, exclusive, open, unequivocal, and notorious, and must be inconsistent with the claim of any other person: *Lindley v. Martindale*, 78 Iowa, 880; *Iowa Loan and Trust Co. v. King*, 58 Iowa, 598; *Thomas v. Kennedy*, 24 Iowa, 397; 95 Am. Dec. 740; *Townsend v. Little*, 109 U. S. 504. We reach the conclusion that the intervener's possession was not of the character required by the law to impart to plaintiff notice of her claim of title, and that, therefore, the plaintiff's mortgage is paramount to her title.

The decree of the district court dismissing the intervener's petition, which is alone appealed from, is affirmed.

POSSESSION OF LAND, NOTICE OF EQUITIES FROM. — The possession of real estate gives constructive notice of the title under which the occupant claims: *Johnston v. Glancey*, 4 Blackf. 94; 28 Am. Dec. 45; and puts a purchaser or creditor on inquiry as to the title of such person: *Morgan v. Morgan*, 3 Stew. 383; 21 Am. Dec. 638; *Grimstone v. Carter*, 3 Paige, 421; 24 Am. Dec. 230; *Bryan v. Ramirez*, 8 Cal. 461; 68 Am. Dec. 340; *Knaz v. Thompson*, 1 Litt. 350; 13 Am. Dec. 246; *Avent v. Arrington*, 105 N. C. 377. And in the absence of inquiry, a purchaser takes the land subject to the equities of the party in possession: *McKee v. Wilcox*, 11 Mich. 358; 83 Am. Dec. 743; *Lapp v. Land Syndicate*, 24 Neb. 692. The purchaser cannot, by failure to acquaint himself with the fact of possession, avoid inquiry or evade the effect of the rule: *Scheerer v. Cuddy*, 85 Cal. 270. But such possession must be notorious and exclusive: *Boyce v. McCulloch*, 3 Watts & S. 429; 39 Am. Dec. 35; and clear and unequivocal: *Billington v. Welsh*, 5 Binn. 129; 6 Am. Dec. 406. The mere fact that one takes possession of land with the owner's consent, makes a few improvements thereon, and then enters into an agreement for the purchase of the legal title, does not constitute that open, notorious, unequivocal, and exclusive possession, under an apparent claim of ownership, which is notice to a *bona fide* purchaser of the legal title: *Sanford v. Weeks*, 38 Kan. 319; 5 Am. St. Rep. 748. On the other hand, where a certain tract of land was sold to A, but by a mistake in the description the deed did not convey all the land purchased, but A was put in possession of the land intended to be conveyed, and made valuable and lasting improvements thereon, one who thereafter purchased the land omitted by mistake from the deed, with notice of the equitable title of A, took the legal title to the land, subject to the equitable title: *Warbritton v. Demorett*, 129 Ind. 346; see, further, *Bowman v. Anderson*, 82 Iowa, 210; *ante*, p. 473.

GRAVES v. MERCHANTS' AND BANKERS' INS. CO.

[82 IOWA, 637.]

JOINDER OF PARTIES PLAINTIFF IN AN ACTION ON POLICY OF INSURANCE. —

A husband and wife are entitled to join as plaintiffs in an action upon a policy of insurance to recover for their respective losses, where the policy has been issued to them jointly for a specified amount, upon a building which is the separate property of the wife, and for not exceeding an amount named upon a stock of merchandise in said building, which merchandise is the separate property of the husband, in consideration of a single sum paid by them as premium, both properties having been destroyed by fire.

FIRE INSURANCE — FURTHER PROOF OF LOSS MAY BE WAIVED BY AGENT OF COMPANY WHEN. —

Where, immediately after the loss of property insured, the insurance company is notified of the loss, and within thirty days from the date of the loss sends its adjuster to investigate the loss, who takes a sworn statement from the insured as to how the fire originated, and as to the amount and value of the property destroyed, and declares his satisfaction with the proofs thus made, the power given to the adjuster to investigate the loss includes the power to take proofs of the loss, and although such proofs may be less complete than the policy called for, the adjuster may be deemed to have had authority to waive any further proofs.

VALUE OF MERCHANDISE INSURED, TESTIMONY OF MERCHANTS ADMISSIBLE TO PROVE. —

Merchants engaged in different lines of business, who saw a stock of insured goods before its destruction by fire, may testify as to the value of such stock, although their testimony is not as satisfactory as might be desired.

LEADING QUESTIONS, WHEN PERMISSIBLE. —

When, in an action on a policy of insurance, the insured testifies generally as to the goods on hand at the time of the fire, it is not improper to allow leading questions to be asked him, for the purpose of directing his attention to particular items in stock.

LETTERS FORMING PART OF SAME CORRESPONDENCE, ADMISSIBLE IN EVIDENCE WHEN. —

When, in action on an insurance policy, the defendant has introduced in evidence its letters to the plaintiff in relation to the loss in question, the plaintiff has the right to put in evidence letters written by him to the defendant, which form a part of the same correspondence, although they contain declarations prejudicial to the defendant.

ACTION on a policy of insurance, alleged by the plaintiffs to have been issued to them by the defendant upon a building, and a stock of merchandise therein. The plaintiffs alleged that the property insured was totally destroyed by fire, and that it was worth the amount for which it was insured. They also alleged that the defendant, by its adjuster, took proofs of the loss, and waived all further proofs of loss, and declared its satisfaction with the proofs made. The defendant, in its answer, admitted the execution of the policy, but denied that it

or its agents had waived the right under the policy and laws of Iowa to demand full and complete proofs of loss. It also denied that the property was of the value alleged, and that it was totally destroyed. It admitted the issuing of the policy, but denied that any notice or proofs of loss were ever given or made. It alleged that the plaintiffs, in their application, represented that an inventory of the goods had been taken in June, 1887, showing that their value was two thousand one hundred dollars, whereas they knew that no inventory had been then made, nor for a long time prior, and that the last inventory taken showed that the goods were of a much less value than two thousand one hundred dollars. The defendant also alleged that the building was the sole and separate property of M. E. Graves, and that the goods were the sole and separate property of T. J. Graves, neither having any ownership in the property of the other, and that there was, therefore, a misjoinder of parties plaintiff, and that the plaintiffs were not entitled to maintain this action. It also alleged that the plaintiffs were estopped by the terms of the policy from claiming the waiver alleged. There was a verdict of \$1,520 for the plaintiffs, and from the judgment entered thereon the defendant appealed. Other facts appear from the opinion.

A. J. Baker and A. A. Haskins, for the appellant.

E. W. Curry, and Parish and Hoffman, for the appellees.

GIVEN, J. 1. We first inquire whether there is a misjoinder of parties plaintiff. It appears without question that the plaintiffs did own the property insured separately, as alleged, neither having any interest in the property of the other, except as it arose from their relation as husband and wife, and the husband's occupancy of his wife's store building. The policy is to them jointly, is for a specified amount on the building, and not exceeding a specified amount on the goods, and was issued in consideration of the single sum paid as premium.

Appellant claims the rule to be, "that if the interest be joint, the action must be joint, although the words are several; and if the interest be several, the covenant will be several, although the terms of it be joint." Authorities are cited sustaining this rule, and it is contended, that as the plaintiffs' interests were several, they cannot maintain a joint action, though the covenant in the policy is by its terms to them

jointly. Whether such is the rule at common law we need not inquire, as the question must be determined upon the provisions of our statute, which is as follows: —

“Sec. 2545. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except where it is otherwise provided in this code.”

In *Skiff v. Cross*, 21 Iowa, 459, it was held that under this section sureties who had paid money for their principal in equal amounts may join in an action to recover the whole amount. It is there said: “What good reason can be given why we should hold that each must bring a separate action, and thus vex the defendant with several suits instead of one? Under the section quoted, the plaintiffs may join, or they might, as heretofore, have brought their separate action, each for the amount he paid.” That these plaintiffs may be entitled to different amounts is no reason why they should be driven to separate actions upon the covenants that are to them jointly: *Fauble v. Davis*, 48 Iowa, 462. Cases cited by the appellant are clearly distinguishable from this. *Rhoads v. Booth*, 14 Iowa, 575, was a joint action by several plaintiffs for malicious prosecution, and it was held that the damages were personal to each, and that they could not join. *Cogswell v. Murphy*, 46 Iowa, 44, was against several separate owners of stock to recover damages done by all of the stock, and it was held that a joint action did not lie against the owners. *Bort v. Yaw*, 46 Iowa, 323, was to recover damages for fraudulent representations made to the plaintiffs, whereby each was induced to enter into separate and independent contracts with the defendant. *Mendenhall v. Wilson*, 54 Iowa, 589, was an action for trespass against two defendants and on contract against one, with a verdict against both for the trespass. There was no evidence against one defendant, and it was held error to refuse an instruction to discharge that defendant, as improperly joined in the action. *Independent School Dist. etc. v. Independent School Dist.*, 50 Iowa, 322, was by several plaintiffs on an implied contract, which, if it did arise, was to each plaintiff separately. It is said in that case that it is not the rule in this state to allow a joinder of plaintiffs where the same result must follow. Clearly, that the same result will follow is not, of itself, ground for a joint action. They must have an interest in the subject of the action, and in obtaining the relief demanded. It will be noticed that in none of these

cases was the cause of action based upon a covenant running jointly to the plaintiff, and for a single consideration. It may be questioned whether the defendant, having contracted with the plaintiffs jointly, is not estopped from denying the joint obligation; but this we do not determine: *Thompson v. City of Keokuk*, 61 Iowa, 187. As bearing somewhat upon this question, see also *Linder v. Lake*, 6 Iowa, 164; *McNamee v. Carpenter*, 56 Iowa, 276; *Kausal v. Minnesota etc. Ins. Ass'n*, 31 Minn. 17; 47 Am. Rep. 776. Section 2548 of the code provides that "persons having a united interest must be joined on the same side, either as plaintiffs or defendants, except as otherwise provided by law." By this policy, and for all the purposes of the insurance, the interests of these plaintiffs in the insured property was united. If this was an action against the plaintiffs on this contract of insurance, they would not be heard to plead a misjoinder, in the face of section 2550, as to joinder of defendants; they, as well as this defendant, being jointly bound by the contract. We are of the opinion that there is no misjoinder of parties plaintiff.

2. A number of the errors assigned arise out of the following facts with respect to notice and proof of loss, and the alleged waiver of other proofs of loss than the statement made to Mr. Overton: It is provided in the policy that "in case of loss the assured shall forthwith give written notice thereof to the company . . . within sixty days; render an account of the loss, signed and sworn to; state how the fire originated; give copies of the written portions of all contracts thereon; also actual cash value and ownership of the property, and the occupation of the premises." The loss occurred January 2, 1888, and on February 2d following, F. C. Overton was sent by the defendant to the place of the loss, to investigate with respect thereto. There is dispute as to what he was authorized to do, but it is unquestioned that he did then and there take a written statement under oath from the plaintiff, T. J. Graves. That statement shows that Graves was sworn to "true answers make to all questions propounded to him by T. C. Overton, adjuster of the Merchants' and Bankers' Insurance Company of Des Moines, Iowa, touching my loss and claim on account of loss by fire," etc. The statement was taken in narrative form in response to questions asked by Overton, and it is with reference to how the fire originated, and contains statements as to an inventory of goods, the amount thereof, the amount and bills of subsequent purchases,

and the current expenses of the assured, thereby tending to show the value of the goods. There was testimony tending to sustain the plaintiffs' allegation that Mr. Overton waived all different or further proofs of loss, and declared the satisfaction of the defendant with the facts and proofs so made. In subsequent letters from the defendant's secretary, Mr. Overton is spoken of as "our adjuster," and the plaintiffs are called upon to furnish original invoices and bills of lading from date of last inventory. There was also testimony tending to show that the plaintiffs immediately notified the defendant's agent who had solicited the risk of the fire, and that he notified the company.

The written statement made to Mr. Overton is in substantial compliance with all that the policy requires as proofs of loss, except that no copies of written portions of contracts are mentioned, nor the occupation of the premises stated. There was no question as to the occupation, and we may infer from the absence of any mention of contracts that there were none. It is said there was no mortgage or other lien upon any of said property. If this statement was not a sufficient rendering of an account of the loss, it was evidently so complete that Mr. Overton might more readily accept it as sufficient proof of loss than one which was less so. It was not a question as to whether Mr. Overton had authority to and did waive the making of any proofs of loss, but rather whether he waived further proofs, — whether he accepted this statement as sufficient. That there was testimony tending to show that he did so accept it is not disputed. As to Mr. Overton's powers, the defendant's secretary testifies that he was sent to investigate the circumstances of the fire, and that he was afterwards appointed to adjust the loss. Taking proofs of loss, as required by the policy, would seem to be a very ready and proper way of investigating "the circumstances of the fire." The statement taken by Overton was sent to and acted upon by the defendant, as shown by letters calling for further proofs, from which to determine the value of the goods lost. We think from all the evidence the jury might find that Mr. Overton had the power to take proofs of loss; that he did waive any other proofs than the statement taken, and did express himself as satisfied therewith. It follows that the errors assigned, upon the theory that there were no proofs of loss, and that Overton did not have authority to waive proofs of loss, are not well founded. There is a marked difference between author-

ity to and waiving of any proofs of loss by an agent, and authority to and waiving any further proofs than those taken by him. The cases cited are all of the first class, and therefore not applicable to this. As stated, there was testimony tending to show that the defendant had notice of the fire soon after, through its soliciting agent; but whether it did or not, it is evident that it had notice upon which it acted. Having acted upon the notice it had, it must be taken, in the absence of objection, to have waived any other or different notice.

3. One Crawford was called by the plaintiffs to testify as to the value of the goods. He stated that he had two and a half years' experience in the hardware business; was then keeping a drug store near the plaintiffs' place of business, and practicing medicine; that he was frequently in the plaintiffs' store; that it seemed to be well filled; did not notice any depletion of stock before the fire; and that in his judgment there was from fifteen hundred to sixteen hundred dollars' worth of goods. Mr. Early, a grocer in the same town, but who had taken no particular notice of Graves's groceries, gave as his judgment that they were worth from two hundred to three hundred dollars. The appellant's objections to this testimony were overruled, of which it complains. It is not as satisfactory as would be desired in arriving at the value of the goods destroyed, and yet it cannot be said that it is so remote as to not bear upon that question. In this, as in many cases of the kind, there are no books and invoices from which to ascertain the value; and of necessity the testimony, which is less convincing, must be received and considered. We think there was no error in receiving this testimony, and leaving its weight to be determined by the jury.

4. Upon examination of the plaintiff T. J. Graves, and after he had stated generally concerning the goods on hand, he was asked a great many questions in chief, such as, "Did you have any augers?"—all of which were objected to as leading. They were leading in form, and yet the circumstances were such as to justify questions thus directing the attention of the witness to each particular item.

5. Objection was made to letters written and sent by the plaintiffs to defendant, on the grounds that they contained statements in favor of the plaintiffs, and that they were not entitled to have their own declarations admitted in their favor. These letters were a part of the correspondence with the defendant, and form simply one side of the conversation

by letters; and defendant's letters being admitted, they were admissible as part of the correspondence. One of plaintiff's letters referred to Mr. Overton as "your adjuster." The appellant contends that they were not entitled to this statement as evidence that he was the defendant's adjuster. Certainly not, unless the defendant in reply admitted it, or was silent on that subject. Without discussing them further, we will say that we are very clear that the letters were properly admitted.

On his examination, Mr. Overton was asked whether he was engaged in any capacity by the defendant "other than to simply take the answers of Mr. Graves, and to report the facts in reference to the fire." The plaintiffs objected, on the grounds that the defendant sent him there as an adjuster, and he held himself out to the plaintiffs as such, and cannot now claim that he was not. The objection was sustained, and the appellant complains. That he did hold himself out to the plaintiffs as an adjuster is shown in the statement he took, and in a letter of February 8th following, the defendant speaks of him as "our adjuster." The question, however, was not whether he was an adjuster, but whether he had authority to take proofs of loss, and waive any further than those taken, or "to simply take the answers of Mr. Graves, and to report the facts in reference to the fire." There was no prejudice in sustaining this objection, as Mr. Kirkham, the secretary, testified afterwards that Overton "was instructed to make investigation as to the circumstances of the fire, and he was instructed positively not to take any proofs of loss." He also explained the letter of the 8th by saying that Overton was then authorized to adjust this loss. If Overton was instructed not to take any proofs of loss, we have seen that he exceeded his instructions by taking them, and that the defendant received and acted upon them from him as "our adjuster," as shown by the correspondence.

This discussion disposes of all the errors assigned and argued, and leads us to the conclusion that the judgment of the district court should be affirmed.

INSURANCE — POWER OF AGENT TO WAIVE CONDITIONS IN RESPECT TO NOTICE AND PROOFS OF LOSS may be exercised by parol, in spite of a provision that no agent can change the terms or conditions, and the same shall not be changed or waived, except in writing signed by the president or secretary: *Carson v. Jersey City etc. Ins. Co.*, 43 N. J. L. 300; 39 Am. Rep. 584. Power to waive a statement of loss is not possessed by a local agent of an insurance company.
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insurance company, who has never been held out by it as possessing any other authority than to receive proposals for insurance, fix rates of premium, and issue policies, and who has never acted in settlement of losses: *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682; 6 Am. St. Rep. 144. The condition as to furnishing proofs of loss in a certain time is deemed to be waived when the adjuster persistently demands further proofs of loss: *Dibrell v. Georgia etc. Ins. Co.*, 110 N. C. 193; 28 Am. St. Rep. 678. A letter written by any agent of the company, including one appointed to investigate the circumstances attending the fire and to adjust losses, is admissible in evidence to explain or excuse delay in furnishing proofs of loss: *Day v. Dwelling-house Ins. Co.*, 81 Me. 244. As to waiver of forfeiture by demand of further proofs of loss, see note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 236-238.

WITNESSES — LEADING QUESTIONS: See note to *Turney v. State*, 47 Am. Dec. 81-85. Where a question leading in form merely relates to the subject-matter, it should be allowed: *Stringfellow v. State*, 28 Mo. 157; 59 Am. Dec. 247; and cases cited at page 84 of the note just referred to.

TRIAL — ADMISSION OF PART OF A TRANSACTION, CONVERSATION, OR DOCUMENT ENTITLES the opposite side to the admission of the whole of it: See note to *Rouse v. Whited*, 82 Am. Dec. 342-345.

JOHNSON v. MILLER.

[32 Iowa, 693.]

MALICIOUS PROSECUTION — GENERAL VERDICT IN ACTION FOR, PRESUMPTION ARISING FROM. — Where the jury return a general verdict in favor of the plaintiff in an action for malicious prosecution, it must be presumed, in the absence of a special finding to the contrary, that they found that the criminal prosecution complained of was instituted by the defendant.

MALICIOUS PROSECUTION — BELIEF IN PLAINTIFF'S GUILT IS INDISPENSABLE. — In an action for malicious prosecution, it is no defense that the prosecution was instituted by the defendant upon the advice of counsel, after a full and fair statement to him of all the material facts in the case, when it appears that the defendant did not believe the accused to be guilty.

PROBABLE CAUSE, WANT OF, INFERRED FROM GENERAL VERDICT WHEN. — From a general verdict for the plaintiff in an action for malicious prosecution, it may be inferred that the jury found a want of probable cause, and such general verdict is reconcilable with a special finding of facts sufficient to warrant a suspicion of the plaintiff's guilt, but not sufficient to lead to a belief of his guilt, upon the theory that the defendant did not believe the plaintiff to be guilty.

ARREST OF JUDGMENT, MOTION IN, WHEN ONLY AVAILABLE. — A motion in arrest of judgment is available only when the facts stated in the petition do not entitle the plaintiff to any relief whatever.

ACTION for malicious prosecution. The facts appear from the opinion.

Boies, Husted, and Boies, for the appellants.

Wheeler and Moffitt, and Wolf and Hanley, for the appellees.

GIVEN, J. 1. The questions presented by this appeal arise upon the defendants' motion for judgment, and their motion in arrest of judgment. Twenty-eight special interrogatories were submitted to and answered by the jury, two of which were at the request of plaintiff, and twenty-six at the request of defendants. The defendants' motion for judgment on the special findings is upon three grounds, namely: "1. Because it is established thereby that defendants did not institute or commence the criminal prosecution complained of by plaintiff; 2. Upon the facts found, they are protected by the advice of counsel; 3. Upon the facts found, there was probable cause for prosecution." The interrogatories are not only numerous, but somewhat lengthy, and it is unnecessary to an understanding of the questions discussed that we more than state their substance in connection with the questions under consideration.

2. There is no direct finding as to whether the defendants did commence the criminal prosecution complained of. In the absence of a special finding to the contrary, we must presume from the general verdict that the jury found that the defendants did commence the criminal prosecution. Such a finding was necessary to be made before they could find a verdict for the plaintiff, and all questions arising in the case, not covered by the special findings, are to be considered as having been found in favor of and covered by the general verdict: *Cook v. Howe*, 77 Ind. 442; *Rice v. Manford*, 110 Ind. 596; *Lassiter v. Jackman*, 88 Ind. 118; *Acton v. Coffman*, 74 Iowa, 17. It is fairly inferable, from the findings hereafter noticed, that the jury did fully understand this issue, and find that the defendants not only commenced the prosecution, but did have something more to do with prosecuting a second indictment than merely to state facts within their knowledge to the district attorney.

3. In response to the second interrogatory submitted by the plaintiff, the jury found that the defendants, in the prosecution of the plaintiff, did not "act in good faith, upon the advice of counsel, believing the plaintiff guilty of such charge." The following questions submitted at the request of the defendants were answered in the affirmative:—

"If you have answered plaintiff's second interrogatory, that

defendants did not act in good faith, upon the advice of counsel, believing plaintiff to be guilty, will you now answer whether defendants fully and fairly stated to the prosecuting attorney all of the material facts for and against the theory of plaintiff's guilt, which had come to their knowledge before the first indictment? A. Yes.

"Q. Did the district attorney, after such statement, advise defendants that there was probable cause to believe the plaintiff guilty, and advise defendants that his case should be submitted to the grand jury? A. Yes.

"Q. Did defendants go before such grand jury by reason of his advice, and in obedience to a subpoena, legally served upon them, and give their evidence, and the only evidence which they gave on that occasion? A. Yes."

It will be seen from these findings that while the jury found that the defendants fully and fairly stated to the prosecuting attorney all of the material facts for and against the plaintiff, which had come to their knowledge, they did not believe the plaintiff guilty of the larceny. The contention is, whether the advice of counsel is a protection to one who commences a prosecution against another who is not guilty, and whom he does not believe to be guilty. It is good faith that excuses from wrongfully commencing or continuing the criminal prosecution. Certainly one cannot be said to act in good faith who causes the prosecution of another on a charge of which he does not believe him guilty. In *Center v. Spring*, 2 Iowa, 393, it is said, as the general expression of the rule, that if "the defendant misrepresents the fact to such counsel, if he does not act in good faith under the advice received, if he does not himself believe that there is cause for the prosecution or action, he will not be protected." In *Acton v. Coffman*, 74 Iowa, 17, the court instructed that if the defendant acted in good faith upon the opinion given by the attorney, "that he believed himself that there was cause for the prosecution," then he is not liable. In that case, the jury found specially that the defendant did seek the advice of counsel; that the attorney, with a full knowledge of the facts, advised that a suit was maintainable, and that the defendant acted on that advice in commencing the prosecution. In that case, as in this, the question was, whether the facts thus found conclusively show that the general verdict is so inconsistent therewith that it must be set aside. The court says: "It must be assumed that the jury followed the instructions above set out.

Therefore they must have found that although the plaintiff stated the facts to counsel, and acted on the advice of counsel in commencing the criminal action, yet in doing so, he did not act in good faith, or that he himself did not believe there was probable cause for prosecution." In that case, as in this, the instruction was not excepted to, and constituted the law of the case.

It is contended that the finding that the defendants did not act in good faith, upon the advice of counsel, believing the plaintiff guilty of the charge, is the finding of a mere inference or conclusion, and is overcome by the other findings. If it be the finding of a mere conclusion, it is sustained by the general verdict, and there is nothing in the other findings to negative it, as it is nowhere found, even by inference, that the defendants believed the plaintiff guilty.

4. Probable cause is defined to be "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." It is a mixed question of fact and law. The sufficiency of the circumstances to constitute probable cause is a question of law for the court, and the evidence of the circumstances is for the determination of the jury: *Conner v. Spring*, 2 Iowa, 393, and authorities therein cited.

The facts found by the jury are, in substance: ~~That~~ ~~the~~ calves were stolen from defendant Foreman on the night of June 3, 1874, in Jones County. In October following Foreman found the calves in the possession of defendant Potter in Green County. Potter claimed to have purchased the calves of the plaintiff, in Jones County, on June 4, 1874. Foreman soon after communicated these facts to the plaintiff, who conceded that he did sell the calves to Potter on June 4, 1874, and claimed that he had purchased them from a man running on a common six or seven miles from his place, of a stranger who said his name was [redacted] at eleven o'clock, on or about June 4th, in a pasture six or seven miles away, where he found the calves, but did not find the stranger. He thereafter settled with Potter for the calves for the value thereof; and that the plaintiff gave no other explanation of his possession of the calves than the defendants prior to the commencement of the prosecution. The further findings show

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

REDIGAN v. BOSTON AND MAINE RAILROAD.

[105 MASSACHUSETTS, 44.]

RAILROAD CORPORATION MAKING NO ATTEMPT TO PREVENT TRAVEL ACROSS its station-grounds and platform, as a short cut between public streets, does not thereby invite the use of such station and platform for the purpose of such travel.

A BARE LICENSEE MUST TAKE PREMISES AS HE FINDS THEM, and has no cause of action if injured on account of dangers there existing. The owner does not owe him any duty to care for him, or to see that he does not go to a dangerous place.

RAILROAD CORPORATION LEAVING UNGUARDED AN OPENING MADE BY RAISING A TRAP-DOOR, forming part of a platform at one of its stations, is not answerable to one injured by falling into such opening while crossing the station and platform without the invitation of the corporation, in order to make a short cut between public streets, though he and other persons had been in the habit of so crossing without objection. This is because he is a mere licensee, to whom the corporation owes no duty to warn him of danger resulting from the ordinary use by it of its premises.

T. G. Kent and G. T. Dewey, for the plaintiff.

F. P. Goulding, for the defendant.

BARKER, J. The railroad station at which the accident happened is so situated that its grounds upon the west and south are contiguous to public streets, Prescott Street on the west, and Lincoln Square on the south. The grounds are uninclosed, and their surface is of substantially the same level and appearance with the streets, so that no line of demarcation is apparent. The station building is surrounded by a platform elevated one step above the ground, and the platform continues southerly along the railroad track to Lincoln Square. In

the other direction, the platform is distant at its northwest corner about twenty-five feet from the easterly line of the other street. The surface of the station-grounds between the streets and the platform was in a suitable condition for public travel, and was very much used by teams and foot-passengers in going to and from the station, and in traveling across the station-grounds from one street to the other. There was no sidewalk or other defined foot-path on the east side of Prescott Street next the station-grounds, but there was a brick sidewalk on the west side of Prescott Street, extending to Lincoln Square. There was a path trodden by foot-passengers extending diagonally across Prescott Street and the northerly portion of the open station-grounds, towards the northwest corner of the platform. The route by this path, and the platform on the west and south sides of the station building, and thence southerly by the platform next the tracks between the northerly part of Prescott Street and the Square at the end of the platform, was a hundred or more feet shorter than that by the public streets. A large number of persons not passengers or having business at the station went over the platform daily, in passing by this short cut from one street to the other. There was no evidence whether the defendant made any attempt to prevent this travel, and none that it permitted it except that it existed in fact. There was also evidence that many people went over the platform on the east side of the station, and some along or between the railroad tracks, when going to Lincoln Square from points northerly of the station.

The plaintiff for seven weeks previous to the accident had walked over the platform twice daily each way in going between her home and the place where she worked. On the night of the accident, she was walking home from the shop by her usual route, leaving the shop at six o'clock with two other working girls. It was very dark. They walked on the sidewalk on the west side of Prescott Street until they came to the foot-path; then walked over the path across Prescott Street and the station-grounds to the north end of the platform, and then a short distance along the platform on the west side of the station, when she fell into a hole or opening which she did not before know of and did not see, and so was injured. The opening into which she fell was made by the raising of a trap-door, which formed part of the platform, and which opened upon stone steps leading to the cellar of the station building. The trap-door had been open for an hour or more

before the accident, and the opening was not guarded by any barrier or light, and there was no person in charge of it, nor other warning. The plaintiff knew that this was a railroad passenger-station, had seen teams drive up to the platform to get passengers and trunks, and had been to this and other passenger-stations constructed in a similar manner with platforms on the outside. The question is, whether, upon the facts shown, the plaintiff was entitled to go to the jury, a verdict for the defendant having been ordered in the superior court.

It cannot be said, as matter of law, that the plaintiff was a trespasser. She knew that the place where she was traveling was not a public way, but the platform of a railroad passenger-station; she was not a passenger of the railroad, and had no business to do at the station, but was merely using the station-grounds and platform as a short cut to facilitate her passage home. Whether her act was or was not a trespass depends upon the attitude of the defendant toward her, and those who were accustomed to use the station in a similar manner. It may properly be inferred that the defendant knew of, and passively allowed, the plaintiff and the public to pass at their pleasure across the station-grounds and the platforms, from one street to the other. On the other hand, it cannot be said that any invitation or inducement was extended by the defendant, to the plaintiff or to the public, to use the station-grounds and platforms as a short cut in traveling from street to street, or for any other purpose than that for which they were designed and adapted in connection with the railroad. It was apparent that the place was a railway passenger-station, and not a way for foot-travel. No arrangement or fitting of the grounds or platform is shown which would convey to any one the idea that the platform was a part of Prescott Street or of Lincoln Square, or of any public way, or that those in charge of it invited its use for other than railroad purposes. The platform was not contiguous to Prescott Street; it led from Lincoln Square to the station building, and did not connect the two streets. It was obviously a part of the railroad station, and for the use of railroad passengers. The use for which it was apparently designed required the land to be left open and easily accessible from the public streets. Besides this, the plaintiff knew that it was a passenger-station and was not in fact induced to believe that she was walking over a public way. The fact that the defendant made no attempt to prevent travel across the station-grounds

and platform, as a short cut between the public streets, was not an invitation to use them for that purpose: *Galligan v. Metacomet Mfg. Co.*, 143 Mass. 527; *Reardon v. Thompson*, 149 Mass. 267.

It follows that the plaintiff's rights are to be determined upon the theory that she was neither a trespasser nor a person induced or invited by the defendant to enter its premises, but a licensee merely, knowingly using the defendant's land and structures for a purpose solely in her own interest, and for which she knew they were not intended, and entering upon them without invitation and without right, by her voluntary act, and with the bare sufferance of the owner.

The case is not one of a concealed peril, or of a trap designedly laid. The exceptions do not show that the door was not easily distinguishable from the platform of which it formed a part, and the use for which it was designed must have been apparent upon inspection.

The general rule is, that a bare licensee has no cause of action on account of dangers existing in the place he is permitted to enter, but goes there at his own risk, and must take the premises as he finds them: *Reardon v. Thompson*, 149 Mass. 267; *Parker v. Portland Publishing Co.*, 69 Me. 173; 81 Am. Rep. 262. No duty is cast upon the owner to take care of the licensee, or to see that he does not go to a dangerous place, but he must take his permission with its concomitant conditions and perils, and cannot recover for injuries caused by obstructions or pitfalls: *Hounsell v. Smyth*, 7 Com. B., N. S., 731; *Batchelor v. Fortescue*, 11 Q. B. Div. 474; *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368, 372; 87 Am. Dec. 644. "An open hole, which is not concealed otherwise than by the darkness of night, is a danger which a licensee must avoid at his peril": Holmes, J., in *Reardon v. Thompson*, 149 Mass. 267, 268; *Sullivan v. Waters*, 14 Ir. C. L. 460, 475.

The plaintiff cannot complain that the defendant, in lawfully using its station and appliances as they were apparently designed and adapted to be used, so changed their condition without her knowledge as to make the place dangerous to her when she attempted to use it in a manner inconsistent with the use which the owner chose to make of it. The defendant was under no obligation to her to light the place, or put up a barrier, or to give warning that the condition of the door made it dangerous for her to attempt to pass. The opening was not a trap, but an ordinary and usual means of access to

a cellar, and so far as the plaintiff was concerned, the defendant owed her no duty to keep it closed rather than open: *Metcalf v. Cunard Steamship Co.*, 147 Mass. 66; *Heinlein v. Boston etc. R. R. Co.*, 147 Mass. 136; 9 Am. St. Rep. 676. The fact that the jury viewed the premises makes no difference in the power of the court to deal with the case upon the evidence presented in court, or with our decision of the question whether the justice presiding at the trial was right in directing a verdict for the defendant.

Exceptions overruled.

REAL PROPERTY — OWNER'S LIABILITY TO PERSONS COMING ON HIS PREMISES. — This subject is fully discussed in *Sweeney v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644; *Elliot v. Pray*, 10 Allen, 378; 87 Am. Dec. 653; and *Zoebsch v. Turbell*, 10 Allen, 386; 87 Am. Dec. 660, and extended note. One going on the premises of another without invitation, and with the mere acquiescence and sufferance of the owner, is a bare licensee, and cannot recover for an injury sustained by reason of a defect in the premises: *Quick v. Adams*, 115 N. Y. 55; 12 Am. St. Rep. 772; *Galveston Oil Co. v. Morton*, 70 Tex. 400; 8 Am. St. Rep. 611. On the other hand, where the permissive use of the property has been such as tends to produce a confident belief that the use will not be objected to, and others are thus led to act on that belief, the owner may be held liable for an injury which would otherwise have affected him with no responsibility: *Houston etc. R'y Co. v. Boorer*, 70 Tex. 530; 8 Am. St. Rep. 615, — a case in which a person using a private path over a railway track was injured.

In the case of *Stevens v. Nichols*, 155 Mass. 472, the doctrine of the principal case was reasserted. The defendants were lessees and occupants of premises on Atlantic Avenue, in Boston, from which avenue an open way extended into such premises, and to other premises beyond them; this way had all the appearances of a public way or street, being paved and sidewalked, except that a granite curbing extended into the way at a point opposite the rear of defendants' premises, and projected some six or seven inches above the paving. On a day when the way was so covered with snow that this curbing could not be seen, plaintiff drove into the way, believing it to be a public street, and was injured, through his sleigh coming into contact with the curbing. The court determined that the plaintiff was, at most, a mere licensee, to whom the defendants could not be held answerable, saying: "It does not appear that the plaintiff had any right in the way, unless he had it as one of the public. There is no allegation or statement that the plaintiff had ever used the way before, or that he knew the way was paved, or noticed whether there was a sign or not. Indeed, if he was then using the way for the first time, the fair inference would be, from the statement of the condition of the snow, that the fact that the way was paved was unknown to him until after the accident, and did not operate as an inducement to enter the way. The declaration contained no allegation as to any use by the public of the way, and the statement, in the opening of counsel, that the public made use of that way, was qualified by the words, 'that is, as much as they had any occasion to pass down there with teams or on foot.' It is difficult to see how vehicles of any description could, when the paving was sufficiently visible to act as an inducement, go over that

portion of the way which the defendants controlled. Without laying stress upon these points, we are of opinion that the declaration and the opening of the plaintiff's counsel do not show that there was any breach on the part of the defendants of any duty which they owed the plaintiff. The defendants were not obliged to put up a sign notifying travelers on the public street that the passage-way was not a public way: *Galligan v. Metacomet Mfg. Co.*, 143 Mass. 527; *Reardon v. Thompson*, 149 Mass. 267; *Redigan v. Boston etc. R. R. Co.*, 155 Mass. 44; *ante*, p. 520. Nor can the fact that the passage-way was paved be considered an invitation or inducement to the public to enter upon it for their own convenience. The defendants have a right to pave it for their own use or for the use of their customers: *Johnson v. Boston etc. R. R. Co.*, 125 Mass. 75; *Heinlein v. Boston etc. R. R. Co.*, 147 Mass. 136; 9 Am. St. Rep. 676; *Reardon v. Thompson*, 149 Mass. 267; *Donnelly v. Boston etc. R. R. Co.*, 151 Mass. 210; *Redigan v. Boston etc. R. R. Co.*, 155 Mass. 44; *ante*, p. 520. There was, in this case, no allegation and no statement that the defendants had any knowledge that the public was using the passage-way, or of such a condition of things that it can be said that they must have known of it. But if it be assumed that there was such use and such acquiescence that a license might be implied, the plaintiff stands in no better position. 'The general rule is,' as stated by Judge Holmes in *Reardon v. Thompson*, 149 Mass. 267, 'that a licensee goes upon land at his own risk, and must take the premises as he finds them.' See also *Redigan v. Boston etc. R. R. Co.*, 155 Mass. 44; *ante*, p. 520; *Gautret v. Egerton*, L. R. 2 Com. P. 371, 374. A licensor has, however, no right to create a new danger while the license continues: *Oliver v. Worcester*, 102 Mass. 489, 502; 3 Am. Rep. 485; *Corrigan v. Union Sugar Refinery*, 98 Mass. 577; *Corby v. Hill*, 4 Com. B., N. S., 556. So a railroad company which allows the public habitually to use a private crossing of its tracks cannot use active force against a person or vehicle crossing under a license, express or implied: *Sweeney v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644; *Murphy v. Boston etc. R. R. Co.*, 133 Mass. 121; *Hanks v. Boston etc. R. R. Co.*, 147 Mass. 495; see *Jane v. Boston etc. R. R. Co.*, 153 Mass. 79, 82. We have no occasion to consider whether the case of *Holmes v. Drew*, 151 Mass. 578, is open to the criticism that it is inconsistent with the doctrine that a person who dedicates a footway to the public use is not obliged to keep it in repair (see *Fisher v. Prowse*, 2 Best & S. 770, 780, and *Robbins v. Jones*, 15 Com. B., N. S., 221), as we are of opinion that that case has no application to the case at bar. In *Holmes v. Drew*, 151 Mass. 578, the defendant made a continuous pavement in front of his house, partly on his own land and partly on the public land; and it was held that the jury might infer from this an invitation to walk over the whole pavement. In the case at bar, the defendants merely opened a private way into a public street, and we fail to see that they thereby invited the public to use it, even though it were paved."

MURCHIE v. CORNELL

[105 MASSACHUSETTS, 60.]

SALE, CONTRACT FOR, REQUIRES ARTICLES TO BE MERCHANTABLE. — A contract for the sale and purchase of ice calls for a merchantable article of that name.

PROTEST MADE AND SWORN TO BY A PURCHASER of ice on the day of its arrival is not evidence that the statements therein contained are true, or that the seller had been informed of any defect in the ice, or for any other purpose, unless it be to show that the claim that the ice was defective in quality was not an afterthought.

H. M. Knowlton, for the defendants.

W. Clifford, for the plaintiffs.

HOLMES, J. 1. The plaintiffs agreed to sell, and the defendants agreed to buy, a cargo of ice of 360 tons, to be shipped from Pembroke, Maine. From some of the evidence it would seem that the ice was not identified by the contract, but was to be supplied and appropriated to the contract by the plaintiffs, the sellers. From other parts of the testimony it might be inferred that the ice was identified by the contract, but at a time and under circumstances when the defendants had no opportunity to inspect it before shipment. The judge instructed the jury generally that there was an implied affirmation that the ice was of such a kind that it could be shipped, transported by sea, and discharged at New Bedford, as contemplated by the contract, and no other implied affirmation or warranty. If the instruction is wrong in either view which the jury might have taken of the facts, the exceptions must be sustained, and it is unnecessary to consider whether the implication would be more extensive in the former case than in the latter.

In some contracts of the latter kind, when the sale is of specific goods, but the buyer has no chance to inspect them, the name given to the goods in the contract, taken in its commercial sense, may describe all that the purchaser is entitled to demand. So it was held with regard to "Manila sugar," in *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331.

But in many cases like the present the inference is warranted that the thing to be furnished must be not only a thing of the name mentioned in the contract, but something more. How much more may depend upon circumstances, and at times the whole question may be for the jury. If a very vague generic word is used, like "ice," which, taken literally, may

be satisfied by a worthless article, and the contract is a commercial contract, the court properly may instruct the jury that the word means more than its bare definition in the dictionary, and calls for a merchantable article of that name. If that is not furnished, the contract is not performed: *Warner v. Arctic Ice Co.*, 74 Me. 475; *Swett v. Shumway*, 102 Mass. 365, 369; 3 Am. Rep. 471; *Whitmore v. South Boston Iron Co.*, 2 Allen, 52, 58.

In a sale of "Manilla hemp," like that of the sugar in *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331, it was held, in England, that the hemp must be merchantable: *Jones v. Just*, L. R. 3 Q. B. 197; *Gardiner v. Gray*, 4 Camp. 144; *Howard v. Hoey*, 23 Wend. 350, 351; 35 Am. Dec. 572; *Merriam v. Field*, 39 Wis. 578; *Fish v. Roseberry*, 22 Ill. 288, 299; *Babcock v. Trice*, 18 Ill. 420; 68 Am. Dec. 560; see *Hight v. Bacon*, 126 Mass. 10, 12; 30 Am. Rep. 639; *Hastings v. Lovering*, 2 Pick. 214, 220; 13 Am. Dec. 420.

2. The plaintiffs put in evidence tending to show that the defendants never notified them of any defect in the quality or condition of the ice until after this suit. To meet this the defendants offered a protest signed and sworn to by one of them on the day the ice arrived. This protest was no evidence that the statements contained in it were true, or that the defendants' story was not false. So far as the plaintiffs' evidence was introduced for the purpose of showing such an acceptance of the ice as to bar the defendants from alleging that it did not satisfy the contract (*Morse v. Moore*, 83 Me. 473; 23 Am. St. Rep. 783; and *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515, 519), the protest, of course, had no bearing. And although it did show that the defendants' story was not an afterthought, it was properly excluded, the plaintiffs, so far as appears, not having taken that specific point: *Wallace v. Story*, 139 Mass. 115.

Exceptions sustained. —

SALES. — **WARRANTY OF MERCHANTABLE QUALITY** is implied in an executory contract to deliver a quantity of corn: *Babcock v. Trice*, 18 Ill. 420; 68 Am. Dec. 560; *Brantly v. Thomas*, 22 Tex. 270; 73 Am. Dec. 284; *Reed v. Randall*, 29 N. Y. 358; 86 Am. Dec. 305; *Sweet v. Shumway*, 102 Mass. 365; 3 Am. Rep. 471; *Forcheimer v. Stewart*, 65 Iowa, 594; 54 Am. Rep. 30. See also notes to *Bailey v. Nickols*, 1 Am. Dec. 84-86; *Emerson v. Brigham*, 6 Am. Dec. 113-119; *Reed v. Randall*, 86 Am. Dec. 312-314; and compare *Buhinkle v. Cramer*, 27 S. C. 376; 13 Am. St. Rep. 645.

EVIDENCE. — **SELF-SERVING DECLARATIONS, WHEN ADMISSIBLE:** See note to *Baker v. Kelly*, 93 Am. Dec. 279, 280.

LOMBARD v. LENNOX.

[155 MASSACHUSETTS, 70.]

DAMAGES. — INJURY TO PLAINTIFF'S FEELINGS may be included as an element of damages in an action for making a false statement, the effect of which was to deprive him of employment.

ACTION for causing the discharge of plaintiff from his employment. He was employed as a laborer by a manufacturer of boots and shoes, and there was a general understanding between such manufacturers that in the event of an apprentice of one going to work for another, the latter would, upon his attention being called to the matter, discharge the apprentice. The defendant, seeing plaintiff at his work, believed him to be one of his apprentices, and so informed his employer, who thereupon discharged him. The defendant was mistaken in his belief. The plaintiff asked the court to rule that he "was entitled to damages for the injury to his feelings." The judge refused to so rule, but gave judgment for the plaintiff for forty dollars. The plaintiff excepted.

W. D. Northend, for the plaintiff.

H. P. Moulton, for the defendant.

KNOWLTON, J. We understand the plaintiff's counsel and the presiding justice to have intended to present by this bill of exceptions the question whether, on the facts found, the court might properly infer that there was an injury to the plaintiff's feelings for which he should have compensation, and not the question whether these facts conclusively establish the existence of such an injury.

If the ordinary and natural consequence of the acts set out in a declaration and proved in an action of tort is to cause an injury to the feelings of the plaintiff, and if the acts are done willfully, or with gross carelessness of the rights of the plaintiff, damages may be recovered for mental suffering. This rule has been applied in actions of trespass to real estate, as well as in others: *Meagher v. Driscoll*, 99 Mass. 281; 96 Am. Dec. 759; *Fillebrown v. Hoar*, 124 Mass. 580, 585.

The wrongful act of the defendant in the present case was analogous to an ordinary actionable slander. It was a false statement, unjustifiably made, which imputed to the plaintiff a disregard of his obligations as apprentice to the defendant, and which had the effect to deprive the plaintiff of the employment on which he relied for his support. In *Markham v.*

Russell, 12 Allen, 573, 575, 90 Am. Dec. 169, Chief Justice Bigelow says: "Undoubtedly, the material element of damage in an action for slander is the injury done to character. But it is not the sole element. A jury have a right also to consider the mental suffering which may have been occasioned to a party by the publication of slanderous words. When an injury has been inflicted on the reputation of a party sufficient to sustain an action at all, he has a right to recover a reasonable compensation for the distress and anxiety which may have been the natural result of the legal wrong which has been done to him."

In the case at bar, the wrong was inflicted directly upon the plaintiff, by making a false accusation against him, which, if believed, would be likely to cause his discharge from the service in which he was engaged. Such an accusation would naturally cause the plaintiff mental suffering and anxiety, in reference, not only to the estimation in which he would be likely to be held by Pevear, for whom he was working, or by others to whom the fact of his discharge might become known, but also to its effect upon his income, through the loss of his situation.

The plaintiff's request for a ruling was made upon the facts proved, and the refusal seems to have been without reference to any question of pleading. But we are of opinion that the declaration, as well as the facts in evidence, was sufficient to warrant an estimate of damages to the plaintiff's feelings. While there is no express reference to the effect of the defendant's wrongful acts on the plaintiff's feelings, the facts alleged are such as would naturally cause the plaintiff mental suffering, and there is nothing to preclude the court from considering all the natural consequences of them.

Exceptions sustained.

DAMAGES, MENTAL SUFFERING, WHEN AN ELEMENT OF: See notes to *Wyman v. Leavitt*, 36 Am. Rep. 306; *West v. Western Union Tel. Co.*, 7 Am. St. Rep. 534-537. As to the allowance of such damages in actions for libel or slander, see note to *Terwilliger v. Wands*, 72 Am. Dec. 435. Mental suffering is a proper element of damage, when it is one of the direct, proximate, and natural consequences of an actionable wrong: *Larson v. Chase*, 47 Minn. 307; 23 Am. St. Rep. 370. It is an element for which damages may be recovered in an action for slander: *Oahill v. Murphy*, 94 Cal. 29; 28 Am. St. Rep. 83. But where a libel is not actionable *per se*, mental anguish cannot be allowed as a part of the damages, without proof of some other injury or damage: *Hirshfield v. Fort Worth Nat. Bank*, 83 Tex. 452; 29 Am. St. Rep. 660.

TRIPP v. GIFFORD.

[155 MASSACHUSETTS, 103.]

INFANTS. — A NEXT FRIEND CANNOT COMPROMISE and discharge an action by agreement made in good faith out of court, where no judgment is entered in pursuance of such agreement, and it is never approved by the court. If, however, judgment should be entered in accordance with the agreement, it would no doubt bind the infant. In the absence of such judgment or approval, the agreement is not admissible in bar of the action, nor in mitigation of damages.

W. C. Parker, for the defendant.

E. D. Stetson, for the plaintiff.

BARKER, J. The action was brought by the father of the plaintiff as next friend. Before the trial, the court removed him, and appointed another person to act in that capacity. At the trial the defendant offered to show, both in bar of the action and upon the question of damages, that the father, while acting as next friend, and intending to protect the plaintiff's interests, had in good faith made a settlement with the defendant, who had paid him the sum of fifty dollars, which both intended should be a full settlement of the cause of action. The only question in the case is, whether this evidence was rightly excluded. No agreement for the settlement or disposition of the cause was filed in court before or after the removal of the father as next friend, but the original liability of the defendant was not contested, and the case went to the jury on the question of damages only.

The question whether a next friend can compromise and discharge the cause of action by an agreement made out of court has never come to this court for decision. Many of the numerous cases in which infants sue by next friends are never brought to a trial, but are so compromised or adjusted by the parties or counsel that they are disposed of by judgments entered in fact by consent. Sometimes, but very rarely, the proposed arrangement is brought to the attention of the court, and its sanction obtained. In most instances, however, the settlement is made and the judgment entered without calling the attention of the presiding justice to it or obtaining his approval. That such judgments conclude the minor we have no doubt, since he is ordinarily bound to the same extent as a person of full age by acts done in good faith by his counsel in the course of a suit; and even in equity, if a decree is entered against him by consent without special inquiry, he will

be bound by the decree: *Walsh v. Walsh*, 116 Mass. 377, 382; 17 Am. Rep. 162.

The principal cases in our reports in which the position of the next friend has been considered are *Parsons v. Jones*, 9 Mass. 106; *Smith v. Floyd*, 1 Pick. 275; *Miles v. Boyden*, 3 Pick. 213, 218; *Crandall v. Slaid*, 11 Met. 288; and *Guild v. Cranston*, 8 Cush. 506. From these decisions it is clear that while he may be any person who will undertake the infant's cause, the next friend is, in theory of law, appointed by the court. His authority is commensurate with the writ, the plaintiff's cause of action, *pro hac vice*, being intrusted to him. He may so conduct himself as to damage the plaintiff, to whom he will thereby become answerable. The court will be slow to interfere and revoke his authority, but when proper cause is shown, it will do so, and appoint another, or stay proceedings. He is not liable for costs, because not a party to the suit. Having been appointed to prosecute for the infant, he may discharge the judgment. The judgment, whether for or against the infant, will, while it remains in force, bar any future action for the same cause.

It is clear that, so far as these authorities go, his position and duties do not necessarily require him to have power out of court to discharge the cause of action. Nor is there any doubt that the general principle is as stated in *Denholm v. McKay*, 148 Mass. 434, 441, 12 Am. St. Rep. 574, that "the rights of infants are sedulously protected by courts of law and of equity, as well as by statute."

An examination of the decisions elsewhere shows that they do not favor the proposition that the next friend may discharge the infant's cause of action by a settlement out of court. It is held that he is an officer of the court, appointed specially for the protection of the infant's interests: *Morgan v. Thorne*, 7 Mees. & W. 400; *The Etna*, Ware, 462; *Baltimore etc. R. R. Co. v. Fitzpatrick*, 36 Md. 619; that he is not a party to the action for any purpose: *Brown v. Hull*, 16 Vt. 673; *Sinclair v. Sinclair*, 13 Mees. & W. 640, 646; *In re Corsellis*, 48 L. T., N. S., 425; *Baltimore etc. R. R. Co. v. Fitzpatrick*, 36 Md. 619; that he cannot submit the case to arbitration: *Tucker v. Dabbs*, 12 Heisk. 18; or bind the infant's estate for attorney's fees: *Houck v. Bridwell*, 28 Mo. App. 644; that he cannot compromise the suit without the express sanction of the court: *Isaacs v. Boyd*, 5 Port. 388; *Miles v. Kaigler*, 10 Yerg. 10; 30 Am. Dec. 425; *Crotty v. Eagle*, 35 W. Va. 143; *Clark v. Crout*,

34 S. C. 417; that while he cannot surrender substantial rights, he may assent to arrangements which will facilitate the trial and determination of the cause: *Kingsbury v. Buckner*, 134 U. S. 650; and that the court will always interpose to protect the infant against the collusion of the next friend with the adverse party, or any misconduct: *The Etna*, Ware, 462.

We see no reason why the next friend should not have authority to institute or to entertain negotiations for a settlement of the controversy. His position with reference to it is like that of a general guardian, or the guardian *ad litem* of an infant defendant. It is to be expected that he will act fairly and intelligently for the real interest of the plaintiff; but it cannot be said that every suit brought in the name of the infant is upon a good cause of action, or that, if well brought, the just amount of the recovery cannot be arrived at without a trial, or that when the next friend and the defendant, and their respective counsel, who are sworn officers of the court, act in good faith, it is necessary that an investigation of the fairness of a proposed adjustment should be made or ordered by the court before disposing of the cause. The next friend is intrusted with the rights of the infant, so far as they are involved in the cause, and acts under responsibility, both to the court and the plaintiff. It may well be considered to be within his official duty to negotiate, if possible, a fair adjustment, without subjecting the plaintiff to the expense and risk of a trial.

When, however, he assumes finally to conclude a settlement out of court, and to discharge the cause of action by an agreement *in pais*, under which he accepts less than the plaintiff's entire demand, he does more than is clearly within his authority to prosecute the action, and more than we think ought to be allowed, with due regard to the protection of the infant. Unless such a settlement is affirmed, either in terms, if brought to the attention of the court, or by an entry of judgment in regular course, it may fairly be held invalid. If it is not of such a nature as to commend itself to counsel, to whom, as well as to the next friend, the infant has a right to look for protection, it ought not to stand, unless sanctioned by the court. It is no injustice to a defendant to hold that the infant is not concluded until the cause is disposed of by judgment.

We hold that in the case at bar the settlement made by the father while next friend, having been made in the country, and not sanctioned by the court, did not conclude the plain-

tiff. Evidence of it, therefore, was not admissible in bar; and as the father was never a party to the cause, no admission of his in the country, at least if made in the course of negotiations for a settlement, was admissible against her on the question of damages.

Exceptions overruled.

INFANTS. — A NEXT FRIEND cannot receive the money on a judgment in favor of an infant, enter satisfaction, and take the money out of court; much less can he compound the judgment: *Miles v. Kaigler*, 10 Yerg. 10; 30 Am. Dec. 425; *Smith v. Redus*, 9 Ala. 99; 44 Am. Dec. 429. Similarly, a guardian *ad litem* has only a special and limited authority, and his acts, so far as they transcend this authority, are void. He has no power to admit away the rights of the infant: *Waterman v. Lawrence*, 19 Cal. 210; 79 Am. Dec. 212. Compare *Long v. Mulford*, 17 Ohio St. 484; 23 Am. Dec. 633.

COMMONWEALTH v. PERRY.

[185 MASSACHUSETTS, 117.]

CONSTITUTIONAL LAW. — **STATUTE DECLARING THAT NO EMPLOYER SHALL IMPOSE a fine or withhold the wages, or any part of the wages, of an employee engaged in weaving, for an imperfection that may arise during the process of weaving, is void, because it conflicts with that part of the state constitution enumerating as one of the inalienable rights of man that "of acquiring, possessing, and protecting property."**

A. J. Bartholomew, for the defendant.

A. E. Pillsbury, attorney-general, for the commonwealth.

KNOWLTON, J. This is an indictment under the statutes of 1891, chapter 125, the first section of which is as follows: "No employer shall impose a fine upon or withhold the wages, or any part of the wages, of an employee engaged at weaving, for imperfections that may arise during the process of weaving." Section 2 provides a punishment for a violation of the provisions of the statute, by the imposition of a fine of not exceeding one hundred dollars for the first offense, and not exceeding three hundred dollars for the second or any subsequent offense.

The act recognizes the fact that imperfections may arise in weaving cloth, and it is evident that a common cause of such imperfections may be the negligence or want of skill of the weaver. When an employer has contracted with his employee for the exercise of skill and care in tending looms, it forbids the withholding of any part of the contract price for

non-performance of the contract, and seeks to compel the payment of the same price for work which in quality falls far short of the requirements of the contract as for that which is properly done. It does not purport to preclude the employer from bringing a suit for damages against the employee for a breach of the contract, but he must pay in the first instance the wages to which the employee would have been entitled if he had done such work as the contract called for. It is obvious that a suit for damages against an employee for failure to do good work would be in most cases of no practical value to the employer, and theoretical remedy of this sort does not justify a requirement that a party to such a contract shall pay the consideration for performance of it when it has not been performed. The defendant contends that the statute is unconstitutional, and it becomes necessary to consider the question thus presented.

The employer is forbidden either to impose a fine or to withhold the wages, or any part of them. If the act went no further than to forbid the imposition of a fine by an employer for imperfect work, it might be sustained as within the legislative power conferred by the constitution of this commonwealth, in chapter 1, section 1, article 4, which authorizes the general court "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same." It might well be held that if the legislature should determine it to be for the best interests of the people that a certain class of employees should not be permitted to subject themselves to an arbitrary imposition of a fine or penalty by their employer, it might pass a law to that effect. But when the attempt is to compel payment under a contract of the price for good work when only inferior work is done, a different question is presented.

There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American states. A statute which violates any of these rights is unconstitutional and void, even though the enactment of it is not expressly forbidden. Article 1 of the declaration of rights in the constitution of Massachusetts enumerates among the

natural, inalienable rights of men the right "of acquiring, possessing, and protecting property." Article 1, section 10, of the constitution of the United States provides, among other things, that no state shall pass any "law impairing the obligation of contracts." The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law.

The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it. Indeed, the statute before us recognizes it as a legitimate business, into which anybody may freely enter. The right to employ weavers, and to make proper contracts with them, is therefore protected by our constitution; and a statute which forbids the making of such contracts, or attempts to nullify them, or impair the obligation of them, violates fundamental principles of right which are expressly recognized in our constitution. If the statute is held to permit a manufacturer to hire weavers, and agree to pay them a certain price per yard for weaving cloth with proper skill and care, it renders the contract of no effect when it requires him, under a penalty, to pay the contract price if the employee does his work negligently, and fails to perform his contract. For it is an essential element of such a contract that full payment is to be made only when the contract is performed. If it be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the constitution guarantees to every one when it declares that he has a "natural, essential, and inalienable right" of "acquiring, possessing, and protecting property." Whichever interpretation be given to this part of the act, we are of opinion that it is unconstitutional; and inasmuch as the instructions of the judge permitted the jury to find the defendant guilty on the second count, a new trial must be granted.

We do not deem it important to consider the other exceptions taken by the defendant, further than to say that we are of opinion that the motion to quash was rightly overruled.

For cases supporting the view we have taken, and for a fur-

ther discussion of the principles involved in the decision, see *Godcharles v. Wigeman*, 113 Pa. St. 431; *State v. Goodwill*, 33 W. Va. 179; 25 Am. St. Rep. 363; *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377; 52 Am. Rep. 34; *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465; *Millett v. People*, 117 Ill. 294; 57 Am. Rep. 869.

Exceptions sustained.

JUDGE HOLMES was unable to concur with the majority of the court, and expressed his dissent as follows: "In the first place, if the statute is unconstitutional, as construed by the majority, I think it should be construed more narrowly and literally, so as to save it. Taking it literally, it is not infringed, and there is no withholding of wages, when the employer only promises to pay a reasonable price for imperfect work, or a price less than the price paid for perfect work, and does pay that price in fact. But I agree that the act should be construed more broadly, and should be taken to prohibit palpable evasions, because I am of opinion that even so construed it is constitutional, so far as any argument goes which I have heard. The prohibition, if any, must be found in the words of the constitution, either expressed or implied, upon a fair and historical construction. What words of the United States or state constitution are relied on? The statute cannot be said to impair the obligation of contracts made after it went into effect: *Lehigh Water Co. v. Easton*, 121 U. S. 388, 391. So far as has been pointed out to me, I do not see that it interferes with the right of acquiring, possessing, and protecting property, any more than the laws against usury or gaming. In truth, I do not think that that clause of the bill of rights has any application. It might be urged, perhaps, that the power to make reasonable laws impliedly prohibits the making of unreasonable ones, and that this law is unreasonable. If I assume that this construction of the constitution is correct, and that, speaking as a political economist, I should agree in condemning the law, still I should not be willing or think myself authorized to overturn legislation on that ground, unless I thought that an honest difference of opinion was impossible, or pretty nearly so. But if the statute did no more than to abolish, in certain cases, contracts for a *quantum meruit*, and recoupment for defective quality not amounting to a failure of consideration, I suppose that it only would put an end to what are, relatively speaking, innovations in the common law, and I know of nothing to hinder it. This, however, is not all. I do not confine myself to technical considerations. I suppose that this act was passed because the operatives, or some of them, thought that they were often cheated out of a part of their wages under a false pretense that the work done by them was imperfect, and persuaded the legislature that their view was true. If their view was true, I cannot doubt that the legislature had the right to deprive the employers of an honest tool which they were using for a dishonest purpose, and I cannot pronounce the legislation void, as based on a false assumption, since I know nothing about the matter, one way or the other. The statute, however construed, leaves the employers their remedy for imperfect work by action. I doubt if we are at liberty to consider the objection that this remedy is practically worthless; but if we are, then the same objection is equally true, although for different reasons, if the workmen are left to their remedy against their employers for wages wrongfully withheld. My view seems to me to be favored by *Hancock*

v. *Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396, and *Slaughter-house Cases*, 16 Wall. 38, 80, 81."

CONSTITUTIONAL LAW. — An extended note discussing the Fourteenth Amendment will be found appended to the case of *State v. Goodwill*, 25 Am. St. Rep. 870-890, referred to in the principal case. The principles involved in *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, were again reviewed in *State v. Fire Creek Coal etc. Co.*, 33 Va. 188; 25 Am. St. Rep. 891.

FITZGERALD v. CONNECTICUT RIVER PAPER CO.

[155 MASSACHUSETTS, 153.]

MASTER AND SERVANT. — EVERY SERVANT ASSUMES THE OBVIOUS RISKS of the service into which he enters, however dangerous the business may be, and though it may easily be conducted more safely by the employer.

NEGLIGENCE — KNOWLEDGE OF DANGER. — One who knowing the danger from the negligence of another, and understanding and appreciating the risk therefrom, voluntarily exposes himself to it, is precluded from recovering for the injury resulting from such exposure.

MASTER AND SERVANT — RISK, ASSUMPTION OF. — ONE DOES NOT VOLUNTARILY ASSUME A RISK, who merely knows that there is some danger, without appreciating the danger.

MASTER AND SERVANT — VOLUNTARY ASSUMPTION OF RISK — QUESTION FOR THE JURY. — It cannot be said, as a matter of law, that a servant voluntarily assumes the risk of injury from slippery steps merely because she attempted to descend them, knowing that they were icy, and that there was some danger in passing over them, if their condition in regard to slipperiness was constantly changing in different states of the weather, and there is evidence tending to prove that she had no other way of leaving the mill in which she was employed.

TORT to recover for injuries received by the plaintiff, a woman fifty-one years of age, while descending a stairway leading from the door of the room in which she worked when in defendant's employment. She had been working in the same mill thirteen years. At the time of the injury, she, with about fifty other women, was employed in the same room and using the same stairway. Near it was a steam exhaust-pipe, the spray from which fell on the steps, and, there freezing, made them slippery. Plaintiff, on leaving her work in the evening for the purpose of going home, attempted to descend these stairs. They had a railing on one side and a platform on the other. She held on to the railing with one hand and in the other held her dinner-pail, but on the next step to the bottom slipped, fell, and was hurt. She knew of the condition of the steps and the location of the waste-pipe. The trial court held that there could be no recovery, and therefore directed a verdict for the defendant.

T. B. O'Donnell, for the plaintiff.

T. M. Brown, for the defendant.

KNOWLTON, J. There was evidence proper for the consideration of the jury on the question whether the defendant corporation was negligent in permitting the steps on which the plaintiff was injured to be slippery and dangerous. It was its duty to provide on its premises a reasonably safe passage-way for the use of its employees in going to and from their work.

There was evidence that fifty women working in the same room with the plaintiff used the steps daily; and it was a question of fact for the jury whether the plaintiff was in the exercise of due care in trying to go down the steps as she did at the time of the accident. The fact that she knew them to be icy, and more or less slippery and dangerous, does not require us to hold, as matter of law, that she was negligent in trying to go down them, holding by the rail, — especially if she had no other way of getting from the mill.

The ground on which the ruling for the defendant was made was, doubtless, that the plaintiff, knowing the icy condition of the steps, assumed the risk of accident, and thereby precluded herself from recovering.

It is well settled that a servant assumes the obvious risks of the service into which he enters, even if the business be ever so dangerous, and if it might easily be conducted more safely by the employer. This is implied in his voluntary undertaking, and it comes within a principle which has a much broader general application, and which is expressed in the maxim, *Volenti non fit injuria*. The reason on which it is founded is, that whatever may be the master's general duty to conduct his business safely in reference to persons who may be affected by it, he owes no legal duty in that respect to one who contracts to work in the business as it is.

In the present case, it does not appear that the steps were icy, or that there was any reason to suppose that the business involved a risk in regard to them, when the plaintiff entered the defendant's service. It cannot be held that when she made her contract she assumed the risk of such an injury as she afterwards received. We therefore come to the question whether, by her conduct since, she has assumed such a risk.

The doctrine, *Volenti non fit injuria*, has not been very much discussed in the cases in this commonwealth, but it is well established in the law, and it has been repeatedly recognized

by this court: *Horton v. Ipswich*, 12 Cush. 488; *Wilson v. Charlestown*, 8 Allen, 187; 85 Am. Dec. 693; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Lovejoy v. Boston etc. R. R. Co.*, 125 Mass. 79; 28 Am. Rep. 206; *Yeaton v. Boston etc. R. R. Corp.*, 135 Mass. 418; *Scanlon v. Boston etc. R. R. Co.*, 147 Mass. 484; 9 Am. St. Rep. 732; *Wood v. Locke*, 147 Mass. 604; *Mellor v. Merchants' Mfg. Co.*, 150 Mass. 382; *Lewis v. New York etc. R. R. Co.*, 153 Mass. 73; *Miner v. Connecticut River R. R. Co.*, 153 Mass. 398. In England it has been much discussed, and the difficulties in the application of it have frequently been considered by the courts. The rule of law, briefly stated, is this: One who knows of a danger from the negligence of another, and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure. It has often been assumed that the conduct of the plaintiff in such a case shows conclusively that he is not in the exercise of due care. Sometimes it is said that the defendant no longer owes him any duty; sometimes, that the duty becomes one of imperfect obligation, and is not recognized in law. In one form or another the doctrine is given effect, as showing that in a case to which it applies there is either no negligence towards the plaintiff on the part of the defendant, or a want of due care on the part of the plaintiff.

In *Thomas v. Quartermaine*, 18 Q. B. Div. 685, Bowen, L. J., says: "The duty of an occupier of premises which have an element of danger upon them reaches its vanishing-point in the case of those who are cognizant of the full extent of the danger, and voluntarily run the risk." It would be unjust that one who freely and voluntarily assumes a known risk for which another is, in a general sense, culpably responsible should hold that other responsible in damages for the consequences of his own exposure. In *Yarmouth v. France*, 19 Q. B. Div. 647, Lord Esher, master of the rolls, expresses the opinion that in such a case it is incorrect to say that the defendant no longer owes a duty to the plaintiff, but that it should rather be said that the duty is one of imperfect obligation, performance of which the law will not enforce.

It may be said that the voluntary conduct of the plaintiff in exposing himself to a known and appreciated risk is the interposition of an act which, as between the parties, makes the defendant's act, in its aspect as negligent, no longer the proximate cause of the injury; or at least, is such participa-

tion in the defendant's conduct as to preclude the plaintiff from recovering on the ground of the defendant's negligence. Certainly, it would be inconsistent to hold that a defendant's act is negligent in reference to the danger of injuring the plaintiff, and that the plaintiff is not negligent in voluntarily exposing himself when he understands the danger. It is to be remembered that in determining whether a defendant is negligent in a given case, his duty to the plaintiff at the time is to be considered, and not his general duty, or his duty to others. Therefore, when it appears that a plaintiff has knowingly and voluntarily assumed the risk of an accident, the jury should be instructed that he cannot recover, and should not be permitted to consider the conduct of the defendant by itself, and find that it was negligent, and then consider the plaintiff's conduct by itself, and find that it was reasonably careful.

But this principle applies only when the plaintiff has voluntarily assumed the risk. As is said by Bowen, L. J., in *Thomas v. Quartermaine*, 18 Q. B. Div. 685, the maxim is not *Scienti non fit injuria*, but *Volenti non fit injuria*. The chief practical difficulty in applying it is in determining when the risk is assumed voluntarily. In the first place, one does not voluntarily assume a risk who merely knows that there is some danger, without appreciating the danger. On the other hand, he does not necessarily fail to appreciate the risk because he hopes and expects to encounter it without injury. If he comprehends the nature and the degree of the danger, and voluntarily takes his chance, he must abide the consequences, whether he is fortunate or unfortunate in the result of his venture. Sometimes the circumstances may show, as matter of law, that the risk is understood and appreciated; and often they may present in that particular a question of fact for the jury.

What constraint, exigency, or excuse will deprive an act of its voluntary character when one intentionally exposes himself to a known risk, is a question about which learned judges differ in opinion. It has been held by some that where a man is not physically constrained, where he can take his option to do a thing or not to do it, and does it, he must be held to do it voluntarily: See opinion of Lord Bramwell in *Membery v. Great Western R'y Co.*, 14 App. Cas. 179, and the dissenting opinion in *Eckert v. Long Island R. R. Co.*, 43 N. Y. 502; 8 Am. Rep. 721. But by the authorities generally, one who in an exigency reluctantly determines to take a risk is

not held so strictly. There has been much difference among the English judges in regard to the question whether a servant who discovers a defect in machinery, not existing when he entered the service, which the master is bound to repair, and who works on, understanding the danger, rather than to lose his place by complaining of it, or refusing to work until it is repaired, shall be held to have voluntarily assumed the risk. In *Members v. Great Western R'y Co.*, 14 App. Cas. 179, Lord Bramwell expressed the opinion that the plaintiff cannot recover in such a case, while the lord chancellor and Lord Herschell, without expressing an opinion, prefer to keep the question open for future consideration. In *Thrussell v. Handyside*, 20 Q. B. Div. 359, the court of queen's bench held that a workman, by continuing to work under such circumstances, does not voluntarily assume the risk; and in *Yarmouth v. France*, 19 Q. B. Div. 647, a majority of the court of appeal were of the same opinion.

In *Sullivan v. India Mfg. Co.*, 113 Mass. 396, is the following language: "Though it is a part of the implied contract between master and servant (where there is only an implied contract) that the master shall provide suitable instruments for the servant with which to do his work, and a suitable place where, when exercising due care himself, he may perform it with safety, or subject only to such hazards as are necessarily incident to the business, yet it is in the power of the servant to dispense with this obligation. When he assents, therefore, to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care and by a reasonable expense, have been made safe. His assent has dispensed with the performance, on the part of the master, of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected." In *Goodnow v. Walpole Emery Mills*, 146 Mass. 261, it is said: "There was no danger which, in view of the plaintiff's knowledge and capacity, must not have been well understood by and apparent to him, and there was therefore no negligence on the part of the defendant in exposing him to it." In *Leary v. Boston etc. R. R. Co.*, 139 Mass. 580, 52 Am. Rep. 733, Mr. Justice Devens uses these words: "But the servant assumes the dangers of the employ-

ment to which he voluntarily and intelligently consents, and while, ordinarily, he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions."

In this commonwealth, as well as elsewhere, plaintiffs have been precluded from recovering, alike where their assumption of the risk grew out of an implied contract in reference to the condition of things at the time of entering the defendant's service, and where they voluntarily assumed a risk which came into existence afterwards: *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Pingree v. Leyland*, 135 Mass. 398; *Moulton v. Gage*, 138 Mass. 390; *Taylor v. Carew Mfg. Co.*, 140 Mass. 150; *Gilbert v. Guild*, 144 Mass. 601; *Murphy v. Greeley*, 146 Mass. 196; *Wood v. Locke*, 147 Mass. 604; *Mellor v. Merchants' Mfg. Co.*, 150 Mass. 362; *Lothrop v. Fitchburg R. R. Co.*, 150 Mass. 423; *Lewis v. New York etc. R. R. Co.*, 153 Mass. 73; *Miner v. Connecticut River R. R. Co.*, 153 Mass. 398.

This court has recognized the doctrine that mere knowledge of a danger will not preclude a plaintiff from recovering, unless he appreciates the risk: *Linnehan v. Sampson*, 126 Mass. 506; 30 Am. Rep. 692; *Lawless v. Connecticut River R. R. Co.*, 136 Mass. 1; *Williams v. Churchill*, 137 Mass. 243; 50 Am. Rep. 204; *Taylor v. Carew Mfg. Co.*, 140 Mass. 150; *Ferren v. Old Colony R. R. Co.*, 143 Mass. 197; *Scanlon v. Boston etc. R. R. Co.*, 147 Mass. 484; 9 Am. St. Rep. 732. See also *Thomas v. Quartermaine*, 18 Q. B. Div. 685; and *Yarmouth v. France*, 19 Q. B. Div. 647. Many other cases in which the plaintiff has not been precluded from recovering may be referred to this principle, and some of them more properly rest on the ground that there were such considerations of duty or exigency affecting him as to present a question whether the assumption of the risk was voluntary, or under an exigency which justified his action, and induced him unwillingly to encounter a danger to which he was wrongfully exposed: *Thomas v. Western Union Tel. Co.*, 100 Mass. 156; *Mahoney v. Metropolitan R. R. Co.*, 104 Mass. 73; *Lyman v. Amherst*, 107 Mass. 339; *Looney v. McLean*, 129 Mass. 33; 37 Am. Rep. 296; *Dewire v. Bailey*, 131 Mass. 169; 41 Am. Rep. 219; *Gilbert v. Boston*, 139 Mass. 313; *Pomeroy v. Westfield*, 154 Mass. 462;

Eckert v. Long Island R. R. Co., 43 N. Y. 502; 3 Am. Rep. 721. Whether the fear of losing one's situation would constitute such an exigency, where the place had become dangerous by reason of the negligence of the employer to repair it, especially if notice of the danger had been given by the servant, and there had been a promise speedily to repair it, we need not decide in this case: See *Leary v. Boston etc. R. R. Co.*, 139 Mass. 580; 52 Am. Rep. 733; *Haley v. Case*, 142 Mass. 316; *Wescott v. New York etc. R. R. Co.*, 153 Mass. 460.

We are of opinion that it cannot be said, as matter of law, that the plaintiff in the present case, in attempting to go down the steps, voluntarily assumed a risk which she understood and appreciated, and which resulted in the accident. She knew that the steps were icy, and that there was some danger in passing over them. But the evidence tended to show that their condition in regard to slipperiness was constantly changing in different states of the weather, with the spray falling daily from the steam-pipe and freezing upon them. Common experience tells us that the degree of slipperiness of ice is not always determinable from an ocular inspection of it. If it were certain that the extent of the danger was obvious to one who saw the surface of the steps, the case would be different.

Besides, there was evidence tending to show that she had no way of leaving the defendant's mill except by going down the steps, and that was important to be considered in deciding whether she took the risk voluntarily.

Osborne v. London and Northwestern Ry Co., 21 Q. B. Div. 220, a case in which the plaintiff sued to recover for an injury received in going down some icy stone steps, is precisely in point. It is said in the opinion, referring to the language of the justices in *Yarmouth v. France*, 19 Q. B. Div. 647, and *Thomas v. Quartermaine*, 18 Q. B. Div. 685: "Those observations go far to make it hard for a defendant to succeed on such a defense as that relied on here, for it is probable that juries would often find for plaintiffs on the ground that they had not full knowledge of the nature and extent of the risk, but that cannot be helped. These judgments introduce an important qualification of the maxim, *Volenti non fit injuria*. In the present case the plaintiff may well have misapprehended the extent of the difficulty and danger which he would encounter in descending the steps; for instance, he might easily be deceived as to the condition of the snow."

We are of opinion that the case should have been submitted to the jury.

Exceptions sustained. —

MASTER AND SERVANT. — ASSUMPTION OF RISKS BY SERVANT is not necessarily predicated from the fact that he knew or ought to have known the actual character and condition of the defective instrumentalities furnished for his use; but he must also have understood, or by the exercise of ordinary observation ought to have understood, the risks to which he was exposed by their use: *Rolseth v. Smith*, 38 Minn. 14; 8 Am. St. Rep. 637. Compare *Taylor etc. R'y Co. v. Taylor*, 79 Tex. 104; 23 Am. St. Rep. 316; *Scanlon v. Boston etc. R. R. Co.*, 147 Mass. 484; 9 Am. St. Rep. 733. A servant takes the risk of known dangers, not of others: *Myers v. Hudson Iron Co.*, 150 Mass. 125; 15 Am. St. Rep. 176.

HIGGINS v. CENTRAL NEW ENGLAND AND WESTERN RAILROAD COMPANY.

[155 MASSACHUSETTS, 176.]

CONFLICT OF LAWS. — AN ADMINISTRATOR APPOINTED IN THE STATE IN WHICH THE DECEDENT HAD HIS DOMICILE succeeds to all rights of action arising out of the statutes of another state.

CONFLICT OF LAWS — RIGHTS OF ACTION UNDER STATUTES OF ANOTHER STATE. — If the statutes of another state give a right of action for injuries to the person, whether they instantaneously result in death or not, and declare that the right shall survive to the executor or administrator, an action may be maintained by the administrator in this state for injuries suffered in the other by his intestate from the negligence of a railway corporation, and resulting in death, if the decedent was domiciled in this state at the time of his injury and death.

CONFLICT OF LAWS. — A FOREIGN LAW, in cases other than penal actions, if not contrary to our public policy, or to abstract justice, or pure morals, or calculated to injure the state or its citizens, will be recognized and enforced here, if we have jurisdiction over the necessary parties, and can see that, consistently with our forms of procedure and law of trials, we can do substantial justice between the parties.

ACTION by an administrator to recover damages for the death of his intestate, alleged to have resulted from the negligence of the defendant corporation. The decedent resided in Massachusetts, but while employed by the defendant as a brakeman, at a point in the state of Connecticut, was instantly killed in a collision. The plaintiff's cause of action was founded upon a statute of the last-named state, providing, in substance, that all actions for injuries to the person, whether the same did or did not instantaneously result in death, should survive to the executor or administrator, and that all

damages for an injury resulting in death, recovered in an action brought by the executor or administrator, shall inure to the benefit of the husband or widow and heirs of the decedent, after deducting the costs and expenses of suit, to wit, one half to the widow or husband, and one half to the lineal descendants, and if there be no descendants, the whole shall go to the husband or widow, and if no husband or widow, the heirs, according to the laws regarding the distribution of intestate personal estate; that in all actions by an executor or administrator for injuries resulting in death through negligence, just damages may be recovered from the party alleged in fault, not exceeding five thousand dollars. A demurrer to the complaint having been sustained by the trial court on the ground that the action could not be maintained because based on the statutes of another state, the plaintiff appealed.

W. G. Bassett and J. T. Keating, for the plaintiff.

T. M. Brown, for the defendant.

BARKER, J. The plaintiff's intestate was domiciled in Massachusetts, where the plaintiff was appointed administrator. This being the principal administration, the plaintiff succeeded as well to every right of action of the deceased which survived as to his other personal property. Upon the question whether such an administrator takes a right of action by succession from his intestate, it is immaterial that the right arose under the statute of a foreign state, rather than under the common law or the statutes of this state; just as the fact that the intestate's chattels or merchandise had been acquired or were held under the statutes of a foreign state, rather than under the law of his domicile, is immaterial upon the question whether such merchandise or chattels pass to the administrator.

Such an administrator is entitled to the aid of our courts, if they have jurisdiction of the necessary parties, in collecting and reducing into money the property which he takes by succession, whether goods, chattels, or choses in action.

Suits brought to enforce rights of action which the deceased had, and which survived and passed from him to his administrator, differ essentially from those which this court refused to entertain in *Richardson v. New York Central R. R. Co.*, 98 Mass. 85, and in *Davis v. New York etc. R. R. Co.*, 143 Mass. 801; 58 Am. Rep. 138. In *Richardson's* case, an administrator appointed here sought to enforce in our courts a cause of

action which his intestate never had, which had not passed to the administrator by succession, and which the statutes of another state had caused to spring up at the death of the intestate, and had provided might be brought by and in the names of his personal representatives, for the exclusive benefit of his widow and next of kin. In Davis's case, the intestate had a right of action in his lifetime by the common law of the state of Connecticut, where he was injured; but by the law of Connecticut his right of action did not survive, and was extinguished at his death, while a penal action created by statute was substituted for it in that state.

In the present case the plaintiff's intestate is alleged to have been instantly killed in Connecticut, by the defendant's negligence. It is conceded that the statute of that state makes the defendant liable to pay damages for the injury which caused his death. Can his administrator sue here to recover such damages? The Connecticut statute places in one category "all actions for injury to the person, whether the same do or do not instantaneously or otherwise result in death," and all actions "to the reputation, or to the property, and actions to recover damages for injury to the person of the wife, child, or servant of any person," and provides that all shall survive to the executor or administrator: Conn. Gen. Stats. 1888, sec. 1008. One evident purpose of this statute was to give to actions for injuries resulting in instantaneous death the same incidents as actions which survive have. It is grouped with actions which survive for other injuries to the person, and for injuries to reputation and to property, and all are said to survive. The putting in operation of the negligent or unlawful forces which cause an instantaneous death is a wrong to the person killed, which, by more or less of appreciable time, precedes his death. If the law of the country where such a wrong is committed gives to the person killed a right of action, and provides that it shall survive to his administrator, there is no difficulty in considering that the deceased had that right of action at the instant when he was *vivus et mortuus*, and that by express provisions of law it is made to survive and to pass to his administrator. This the statute referred to has plainly attempted to do. As was held in *Davis v. New York etc. R. R. Co.*, 143 Mass. 301, 58 Am. Rep. 138, it is the right of each state "to determine by its laws under what circumstances an injury to the person will afford a cause of action." Viewing this statute of Connecticut

as a whole, it plainly puts such causes of action as the present upon the footing of personal actions which survive, and which are everywhere considered transitory; that is, they go with the person who has the right of action where he goes, and are enforceable in any forum according to its rules of procedure. If they survive, such actions, like other personal estate, are considered to have *situs* in the place of domicile, and to pass to the administrator there appointed. Viewing the causes of action with which the Connecticut statute deals in connection with the one now sued on, our own statutes of survivorship are similar. There is, therefore, nothing in the nature of the cause of action as so far developed to prevent our courts from entertaining it upon principles generally recognized.

Assuming that the cause of action is one not existing at the common law, but created by the statute of another state, we have seen that it is transitory, and that it survives and passes from the deceased to his administrator. When an action is brought upon it here, the plaintiff is not met by any difficulty upon these points. Whether our courts will entertain it depends upon the general principles which are to be applied in determining the question whether actions founded upon the laws of other states shall be heard here. These principles require that, in cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the state or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. If the foreign law is a penal statute, or if offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this state or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if under our forms of procedure an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction: *Blanchard v. Russell*, 13 Mass. 1, 6; 7 Am. Dec. 106; *Prentiss v. Savage*, 13 Mass. 20, 24; *Ingraham v. Geyer*, 13 Mass. 146; 7 Am. Dec. 132; *Tappan v. Poor*, 15 Mass. 419; *Zipcey v. Thompson*, 1 Gray, 243, 245; *Erickson v. Nesmith*, 15 Gray, 221; 4 Allen, 233, 236; *Halsey v. McLean*, 12 Allen, 438, 443; 90 Am. Dec. 157; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349, 353; *Bank of North America v. Rindge*, 154 Mass. 203; 26 Am. St. Rep. 240.

Applying these rules, we find no sufficient reason for declining to entertain the present action. Our own statutes have, in several instances, changed the policy of the common law, so as to allow damages for death occasioned by negligence: Pub. Stats., c. 52, sec. 17; c. 73, sec. 6; c. 112, sec. 212; Stats. 1883, c. 243; Stats. 1887, c. 270, sec. 2. The right created by the Connecticut statute is in terms a right to recover "just damages": Conn. Gen. Stats. 1888, sec. 1009. Neither the fact that the statute creating it limits the amount of the recovery to a sum not exceeding five thousand dollars, nor that the damages are to be distributed to the husband, widow, heirs, or next of kin, makes it a penal action. The effect of such provisions as to the distribution of the damages is to say that they shall not be assets for the payment of debts, and shall not pass by the will of the deceased, but shall be applied to the compensation of the persons who are presumed to have suffered the most by the death of the person injured. Such a right is not unjust, nor contrary to good morals, nor calculated to injure the state or its citizens. Our courts have jurisdiction of the necessary parties. Looking at the statute creating the right of action as a part of the system of law in force in Connecticut, and considering that if the action is to be prosecuted here, our rules of law regulating procedure, and fixing the elements which are to enter into the assessment of the damages, must govern the trial, it is probable that the result will not be exactly the same as if the remedy had been pursued in Connecticut. But we see no such difficulty as to lead us to suppose that injustice may be done to the defendant, and none which ought to make us decline jurisdiction, if the plaintiff elects to sue here.

The statutes which create and limit the right of action are found in the provisions regulating civil actions in the courts of Connecticut, and are part of its general system of law. By "the costs and expenses of suit" which, under section 1009, are to be deducted from the damages before they are distributed, were intended costs of suits allowed under Connecticut laws, and the expenses of the suit exclusive of such costs, these expenses, including those of trials not resulting in a verdict, are a constituent element of the "just damages" under the Connecticut system. The same system allows exemplary and vindictive damages: *Noyes v. Ward*, 19 Conn. 250; *Beecher v. Derby Bridge and Ferry Co.*, 24 Conn. 491, 497; *Murphy v. New York etc. R. R. Co.*, 29 Conn. 496, 499. If, in

the action prosecuted here, neither the expenses of the suit nor exemplary nor vindictive damages can be recovered, that fact is no hardship upon the defendant. There is no reason why the plaintiff may not be allowed to waive those elements of damage by bringing his action in a forum where they cannot be allowed. It is also a part of the Connecticut system, that, upon the default of a defendant in such actions, the plaintiff has no right to have his damages assessed by a jury, and in practice the assessment is uniformly made by the court alone: Conn. Gen. Stats. 1888, sec. 1106; *Raymond v. Danbury etc. R. R. Co.*, 43 Conn. 596, 598. Upon such assessment in Connecticut, the defendant, to reduce the damages to a nominal sum, may show contributory negligence, or any matter which, if pleaded and proved in bar, would have defeated the action: *Daily v. New York etc. R. R. Co.*, 32 Conn. 356; 87 Am. Dec. 176; *Carey v. Day*, 36 Conn. 152. But even if it appeared that the motive for bringing an action here was to insure an assessment of the damages by a jury, we cannot perceive in that a valid reason for declining to take jurisdiction.

It is to be noticed that while the statute upon which the plaintiff founds his claim makes the cause of action one which accrued to the plaintiff's intestate in his lifetime, and provides that it shall survive and pass to his administrator, it does not say in terms that the damages shall or shall not be assets of the intestate estate, but provides that they shall be distributed in a way which may or may not be different from the disposition to be made under our law of the assets of the deceased to be administered. As this intestate was domiciled in Massachusetts, we are not to be taken as now deciding how any damages which the plaintiff may recover are to be here administered.

Demurrer overruled.

STATES — COMITY BETWEEN — CONFLICT OF LAWS. — Comity of one state will enforce the laws of another when such enforcement neither violates its own laws or infringes the rights of its own citizens: *Deringer v. Deringer*, 5 Houst. 416; 1 Am. St. Rep. 150, and note. See note to *Forepaugh v. Delaware etc. R. R. Co.*, 15 Am. St. Rep. 679, 680, where the cases on this subject are collected.

STATUTES OF FOREIGN STATES — ENFORCEMENT OF. — A cause of action accruing in Iowa under a statute rendering railways liable to their employees for injuries by negligence in the operation of such railways may be enforced in this state: *Herrick v. Minneapolis etc. R'y Co.*, 31 Minn. 11; 47 Am. Rep. 771, and note. If an injury is suffered in one state, and the action is brought

in another for damages resulting therefrom, the law of the former, whether statutory or otherwise, determines the plaintiff's right to recover: *Bridger v. Asheville etc. R. R. Co.*, 27 S. O. 456; 13 Am. St. Rep. 653, and note. A right of action created by statute in one state may be prosecuted in another, when the two states have substantially similar statutes on the subject: *O'Reilly v. New York etc. Ry Co.*, 16 R. L. 388.

JOHNSON v. WALKER.

[155 MASSACHUSETTS, 282.]

CONTRACT FOR PERSONAL SERVICES IS TERMINATED by the inability, for the period of seven weeks, from sickness or disease, of the person who is to render the services to perform his duties, and on his recovering his health, he is not entitled to be reinstated in his employment for the balance of the term.

ACTION to recover for a balance alleged to be due under a contract to work for the defendants for a year. The plaintiff was employed by defendants to act as superintendent of a number of men in a shoe-shop. After serving several months, he became ill with typhoid fever, and so remained about seven weeks, during all of which time he was absent from his employment. His illness was not such at any time as to indicate that he would lose his life or be permanently incapacitated. On recovering, he returned to his employment, and offered to work for the remainder of the time specified in the contract, but his services were refused, on the ground that he had been discharged and another person put in his place. The trial judge ruled that as a matter of law the plaintiff could not recover, and he alleged exceptions.

J. J. Dowd, for the plaintiff.

H. Kingman, for the defendants.

MORTON, J. If the contract was an absolute one, the plaintiff is entitled to recover. There were no qualifications annexed to it in terms. But we think, as matter of law, it must be deemed to have been a qualified and conditional contract. It related to the personal services of the plaintiff. These could be performed by no one except him. The work to which they related could be done by another; but his own services could be rendered by no one except himself. They could be rendered by him only so long as he was of sufficient health and capacity. We think, therefore, that it was implied that inability from sickness or disease to perform the services

on which the contract depended would be a sufficient excuse for non-performance on his part and on that of the defendants: *Yerrington v. Greene*, 7 R. I. 589; 84 Am. Dec. 578; *Cuckaon v. Stones*, 1 El. & E. 248, 257; *Spalding v. Rosa*, 71 N. Y. 40; 27 Am. Rep. 7; *Robinson v. Davison*, L. R. 6 Ex. 269; *Boast v. Firth*, L. R. 4 C. P. 1; *Hubbard v. Belden*, 27 Vt. 645; *Ryan v. Dayton*, 25 Conn. 188; 65 Am. Dec. 560; *Green v. Gilbert*, 21 Wis. 395.

Whether a temporary illness of a few hours, or in some instances perhaps of a few days, would in all cases come within the implied condition, we need not consider. In the present case the plaintiff was sick about seven weeks, and during all that time, as the exceptions state, was incapacitated from work in the defendants' shop. We think that, as matter of law, this constituted such an interruption of and failure to perform his contract on the part of the plaintiff, that the defendants were justified in terminating it, and employing another person in his place.

If the defendants had not paid the plaintiff all that was due him at the time when he was taken ill, his illness would have operated as an excuse, so that, notwithstanding the non-performance of his contract, he could have maintained an action against them for the amount due him: *Fuller v. Brown*, 11 Met. 440; *Harrington v. Fall River Iron Works*, 119 Mass. 82. But the fact that he was incapacitated by causes beyond his own control, or, as it is termed, by the act of God, did not deprive the defendants of their right to terminate the contract, or oblige them to keep his position for him till he recovered. The right of the defendants to terminate the contract did not depend on giving notice to the plaintiff, but on the fact that he had become unable to render the services on whose continuance the contract depended.

Without undertaking to say that in no case could there be a duty on one side or the other to give notice of an intention to dissolve the contract because of inability to perform it on account of illness, we think there was no such duty on the defendants in the present case.

Exceptions overruled.

MASTER AND SERVANT—DISCHARGE FOR SICKNESS BEFORE EXPIRATION OF TERM OF HIRING.—An employee may recover the reasonable value of his services rendered, when he agrees to labor for a certain time for a specified sum, and is discharged by the employer because of absence caused by sickness: *Ryan v. Dayton*, 25 Conn. 188; 65 Am. Dec. 560, and note; *Lake*

man v. Pollard, 43 Me. 463; 69 Am. Dec. 77, and note; *Pizler v. Nichols*, 8 Iowa, 106; 74 Am. Dec. 298, and note. See *Spalding v. Rosa*, 71 N. Y. 403; 27 Am. Rep. 7, cited in the opinion, in which it was held that sickness and inability on the part of one contracting to do certain services at the time specified is a good excuse for the non-performance of the agreement by the other party.

WAY v. TOWLE.

[155 MASSACHUSETTS, 274.]

BANKS AND BANKING. — A CHECK PAYABLE AT A FUTURE DAY must be treated as a check, rather than as a bill of exchange, and is not entitled to days of grace.

ACTION seeking to charge defendant as an indorser of the following instrument: —

100 Franklin St.	\$200.	Boston, Aug. 31, 1889.
		The National Revere Bank
		of Boston.
		Pay to the order of <i>Geo. H. Towle</i> , Oct. 1, 1889,
	 <i>Two Hundred</i> Dollars.
	No. 9233.	<i>Samuel W. Creech, Jr.</i>

The words printed in Italics were written in the original instrument, while the other words were printed. The instrument was indorsed before maturity by the payee named therein, and was presented to the bank for payment, October 1, 1889, and payment being refused, it was, on the same day, protested, and notice of non-payment given to the defendant. He asked the trial judge to rule that the writing was a bill of exchange, and as such entitled to days of grace, but the court declined to so rule, and, on the contrary, directed judgment for the plaintiff.

W. B. Gale, for the defendant.

J. M. Way, pro se.

MORTON, J. The question in this case is, whether the instrument declared on is a check or a bill of exchange. If the former, it had no days of grace; if the latter, it had, and demand was prematurely made, and the indorser is not liable. The question whether a check made payable on a day subsequent to its date should be regarded as a check or as a bill has been decided differently in different jurisdictions: *In re Brown*, 2 Story, 502; *Champion v. Gordon*, 70 Pa. St. 474; 10

Am. Rep. 681; *Westminster Bank v. Wheaton*, 4 R. I. 30; *Ivory v. Bank of Missouri*, 36 Mo. 475; 88 Am. Dec. 150; *Henderson v. Pope*, 39 Ga. 361; *Morrison v. Bailey*, 5 Ohio St. 13; 64 Am. Dec. 632; *Minturn v. Fisher*, 4 Cal. 35, 36; *Bowen v. Newell*, 13 N. Y. 290; 64 Am. Dec. 550. In the present case, the instrument appears to be upon one of the ordinary printed blanks of the bank on which it is drawn. It is dated August 31, 1889, and the only difference that is suggested between it and an ordinary check is, that it is made payable October 1, 1889. If it had been post-dated as of that date, it would not have been payable till then, and yet would, in that case, have been a check. It has all the other characteristics of a check, and we cannot believe that it was intended by the parties, or would have been taken by the bank on which it was drawn, as anything else than a check. It is often convenient to make a check payable at a future day, and we see no valid distinction between post-dating it and making it payable at a subsequent date. In the latter case, as in the former, it is expected that it will be presented on the day when payable, which, in the one instance, would be the day of its date, and in the other, the day fixed for its payment, and that there will be funds to meet it, and that it will then be paid. And neither in the latter case, any more than in the former, would it be expected that the holder would present the check to the bank on which it was drawn for acceptance before payable, and, on its refusal to accept it, protest it, and bring suit forthwith against the drawer for the non-acceptance.

We think it better accords with the intent and understanding of the parties, and of bankers and business men generally, to treat the instrument in suit as a check, rather than as a bill of exchange, and we see no valid objection to doing so.

Exceptions overruled.

CHECKS, POST-DATED, HOW TREATED. — A post-dated check is payable on the day it bears date, without grace: *Salter v. Burt*, 20 Wend. 205; 32 Am. Dec. 530, and note; *Champion v. Gordon*, 70 Pa. St. 474; 10 Am. Rep. 681. A check is payable immediately upon presentment and demand, and is not entitled to days of grace: *Morrison v. Bailey*, 5 Ohio St. 13; 64 Am. Dec. 632, and note. A written order on a bank to pay a sum of money at a day subsequent to its date and to the date of its issue is not a check, but a bill of exchange, and is entitled to days of grace: *Harrison v. Nicolet Nat. Bank*, 41 Minn. 433; 16 Am. St. Rep. 718, and note; note to *Bowen v. Newell*, 64 Am. Dec. 551.

BLOUNT v. KIMPTON.

[155 MASSACHUSETTS, 378.]

ATTORNEY AND CLIENT — PRIVILEGED COMMUNICATIONS. — A communication from a client to an attorney, though made in the presence of a third person, cannot be disclosed by the attorney without the consent of the client.

ACTION upon promissory notes. The defendants sought to defeat plaintiff's action by proving that the notes were issued pursuant to a secret agreement entered into between plaintiff and defendants before the execution of a certain compromise agreement. One Barton, an attorney at law, being called as a witness, was asked to detail a conversation with plaintiff in the presence of one of the defendants, but the judge ruled that the conversation was privileged, and did not permit the attorney to disclose it. Verdict for the plaintiff.

N. B. Bryant, for the defendants.

P. B. Kiernan, for the plaintiff.

MORTON J. The defendants do not question the well-settled rule that confidential communications made by a client to an attorney for the purpose of obtaining his advice and assistance in reference to the matter which is the subject of them cannot be disclosed by the attorney without the consent of the client: *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400. They contend that if they are made in the presence and hearing of a third person, that removes the privilege, and makes the testimony of the attorney concerning them admissible. But as between the client and attorney, they are still confidential, though made in the presence or hearing of a third party. The only effect of that is that they are less confidential in fact, and that such third party may testify to them. It does not qualify the attorney as a witness: *Hey v. Morris*, 13 Gray, 519; 74 Am. Dec. 650.

The defendants also urge that the privilege has been waived by the plaintiff, for the reason, as they contend, that in the lower court the plaintiff called the attorney as a witness, and interrogated him as to the conversation between the attorney and himself, when the former was acting as counsel for him, in reference to the transaction now in suit. It is possible that the fact may have been as the defendants assert. It is possible, also, that the attorney may not have testified or not have been interrogated by the plaintiff as to the conversations.

The fact that he testified to other things would constitute no waiver of the privilege as to the conversations: *Montgomery v. Pickering*, 116 Mass. 227. The exceptions do not state that he testified to the conversations, but to the "above-mentioned transactions." That may mean, and naturally would mean, that he testified to what was done, not to what was said. We cannot assume, in favor of the defendants, who are the excepting party and have the burden, that the fact was as they contend. It is unnecessary to consider, therefore, whether the privilege was or was not waived.

Exceptions overruled.

ATTORNEY AND CLIENT — PRIVILEGED COMMUNICATIONS. — A communication from a client to an attorney is not confidential when made in the presence of another party: *Whiting v. Barney*, 30 N. Y. 330; 86 Am. Dec. 385, and note; note to *Dietrich v. Mitchell*, 92 Am. Dec. 103; note to *Harris v. Daugherty*, 15 Am. St. Rep. 818. Communications made to an attorney are not privileged, unless they are made confidentially to obtain counsel: *Cady v. Walker*, 62 Mich. 157; 4 Am. St. Rep. 834. If two or more persons consult an attorney for their mutual benefit, and make statements in his presence, he may disclose such statements in any controversy between them or their personal representatives or successors in interest, but not in controversies between them, or either of them, and third persons: *Hurlbert v. Hurlbert*, 128 N. Y. 420; 26 Am. St. Rep. 482, and note. The rule of privilege does not apply to communications between parties to an agreement made before an attorney, or between such parties and the attorney of one of them, or when made by one party to his counsel in the presence of the other party: *Hughes v. Boone*, 102 N. C. 137.

MONAGHAN v. COX.

[155 MASSACHUSETTS, 487.]

MALICIOUS PROSECUTION — ADVICE OF MAGISTRATE. — As evidence tending to show probable cause, the prosecutor should be permitted to prove that he went to a justice, who was also an attorney at law, and fairly disclosed to him all the facts within his knowledge, and was thereupon, by such justice, advised that the proper method of procedure was by a criminal complaint, and that, acting in good faith upon such advice, he caused the complaint to be made and signed, and swore to the same.

ACTION for malicious prosecution in charging plaintiff with breaking into and entering defendant's dwelling-house in the night-time with intent to commit larceny. Defendant offered to prove that he went to a magistrate of the district court for the purpose of obtaining a search-warrant; that the justice was a member of the bar of the commonwealth; and that, act-

ing under his advice, the defendant made the complaint under which the prosecution took place. The evidence being excluded, judgment was entered in favor of the plaintiff, and the defendant alleged exceptions.

H. P. Moulton and N. J. Holden, for the defendant.

H. F. Hurlburt, F. L. Evans, and D. W. Quill, for the plaintiff.

BARKER, J. The offer of proof was evidently considered at the trial as an offer to show such a state of facts as would have been a justification if the counselor whose advice the defendant followed had not been the magistrate to whom his complaint was addressed. It ought not to receive a narrow or technical construction, and we are therefore free to consider the principal question raised, which is, whether, upon the defense of probable cause in an action for malicious prosecution, the defendant may show that in making the complaint he acted upon the advice of the magistrate to whom the complaint was addressed.

The state of the authorities upon this branch of the subject of probable cause as a defense in such actions is this: It has been commonly held that the advice of counsel is a protection: *Ravenga v. Mackintosh*, 2 Barn. & C. 693; *Stone v. Swift*, 4 Pick. 389; 16 Am. Dec. 349; *Olmstead v. Partridge*, 16 Gray, 381; *Allen v. Codman*, 139 Mass. 136; *Donnelly v. Daggett*, 145 Mass. 314; *Stewart v. Sonneborn*, 98 U. S. 187; *Bernar v. Dunlap*, 94 Pa. St. 329; *Cooney v. Chase*, 81 Mich. 203; *Wicker v. Hotchkiss*, 62 Ill. 107; 14 Am. Rep. 75; *Eastman v. Keasor*, 44 N. H. 518; *Ash v. Marlow*, 20 Ohio, 119; *Paddock v. Watts*, 116 Ind. 146; 9 Am. St. Rep. 832; but not if the counsel is himself interested: *White v. Carr*, 71 Me. 555; 36 Am. Rep. 353. The advice of magistrates who are not counselors at law has been held no protection: *Olmstead v. Partridge*, 16 Gray, 381; *Straus v. Young*, 36 Md. 246; *Coleman v. Heurich*, 2 Mackey, 189; *Brobst v. Ruff*, 100 Pa. St. 91; 45 Am. Rep. 358; *Gee v. Culver*, 12 Or. 228; *Cooney v. Chase*, 81 Mich. 203; *Gilbertson v. Fuller*, 40 Minn. 413; *McLeod v. McLeod*, 73 Ala. 42, 46. In *Sisk v. Hurst*, 1 W. Va. 53, the advice of a magistrate was held to protect, but the report does not show whether he was a counselor at law. In *Turner v. Dinnegar*, 20 Hun, 465, advice given by a magistrate who was also a counselor at law was held to be a protection. In England, if, under the statute conferring jurisdiction upon the

magistrate, he is required before granting the warrant to try the question of probable cause, the complainant is not liable to an action: *Hops v. Evered*, 17 Q. B. Div. 338; *Lea v. Charrington*, 23 Q. B. Div. 45. See Stats. 48 & 49 Vict. (Crim. Law Amendment Act), c. 69, sec. 10. Where the advice is given by an attorney-general, county attorney, or prosecuting officer in his official capacity, it is a protection: *Smith v. Austin*, 49 Mich. 286; *Yocum v. Polly*, 1 B. Mon. 358; 36 Am. Dec. 583; *Huntington v. Gault*, 81 Mich. 144; *Schippel v. Norton*, 38 Kan. 567

The logic of the defense is, that the proceedings alleged to have been malicious were in fact instituted in good faith and upon probable cause; and that it is, upon the whole, better that he who thus sets them in motion with the purpose of vindicating the law should be protected in the act, although an alleged offender may sometimes suffer unjustly, than that wrong and crime should go unpunished because of the danger incurred in making complaints. To establish the defense, it is required of the party himself, if he claims protection because he acted upon the advice of others, that he shall act in good faith, believing that he has good cause for his action, and not seeking to procure an opinion in order to shelter himself; that he shall make a full and honest disclosure of all the material facts within his knowledge or belief; that he shall be himself doubtful of his legal rights, and shall have reason to presume that the person to whom he applies, or whose advice he follows, is competent to give safe and prudent counsel; and that he shall honestly pursue the directions of his adviser; the adviser must be learned in the law, and of such training and experience that he may safely be presumed to be competent to give wise and prudent counsel in important matters, and must act under a sense of responsibility. By our own decisions above referred to, if, upon the evidence, it is clear that the complainant so acted, and that his adviser was a counselor at law, the defense is established, and the court will direct a verdict for the defendant: *Allen v. Codman*, 139 Mass. 136. But if, upon the evidence, the facts essential to the defense are in dispute, they are to be submitted to the jury.

In the case at bar the question is, not whether a verdict for the defendant should have been ordered, but whether evidence that he acted under advice should have been admitted. Inasmuch as the advice was given by a magistrate who was a

counselor at law, the case is not governed by the decision in *Olmstead v. Partridge*, 16 Gray, 381. We agree entirely with the principles of that decision, and with their statement and discussion by the distinguished jurist by whom the opinion was written. At the same time it is a question whether the judicial system of the commonwealth has not, since the time of that decision, been so changed and improved in respect to the learning, capacity, and standing in the community of the magistrates now intrusted with the power of issuing warrants in criminal cases, that the conclusion then reached, that evidence that the complainant acted upon the advice of a justice of the peace who was not a counselor or attorney at law was incompetent to disprove malice, ought to be now reconsidered.

Olmstead v. Partridge, 16 Gray, 381, was decided in the year 1860. Since that time the authority to issue warrants for criminal offenses has been taken from ordinary justices of the peace, and is lodged in officers specially designated for the purpose, and in trial justices, and the justices of police, district, and municipal courts. A very large majority of the gentlemen now having this authority are members of the bar, and all have been selected with care, and are known to the community as wise and discreet men. Besides this, they are disinterested and independent, and not, as was sometimes felt to be the case with justices of the peace under the old system, under the control or influence of particular persons. No one expects that the old order of things will be reinstated, or that less care will in the future be exercised in the selection of the magistrates to whom, under the present system, the duty of receiving complaints is intrusted. If, then, it is clear that our magistrates of this class possess the qualifications and are free from the disqualifications mentioned in the opinion of the court in *Olmstead v. Partridge*, 16 Gray, 381, the same principles which led the court to its decision in that case now require us to decide differently. In that case Bigelow, C. J., says: "In actions for malicious prosecution, it has been held to be competent for the defendant to prove, in order to establish the fact of probable cause, that in prosecuting the plaintiff on a criminal charge he acted in accordance with the advice of counsel on a full and correct statement of all the material facts bearing on the case. . . . But such testimony has always been limited to communications with counsel or attorneys. Statements made to other persons and advice given by them have never been deemed admissible.

The law wisely requires that a party who has instituted a groundless suit against another should show that he acted on the advice of a person who, by his professional training and experience, and as an officer of the court, may be reasonably supposed to be competent to give safe and prudent counsel, on which a party may act honestly and in good faith, although to the injury of another. But it would open the door to great abuses of legal process if shelter and protection from the consequences of instituting an unfounded prosecution could be obtained by proof that a party acted on the irresponsible advice of one who could not be presumed to have better means of judging of the rights and duties of the prosecutor on a given state of facts than the prosecutor himself." We believe that it is now a commonly recognized fact that the magistrates authorized to issue warrants in this commonwealth have such knowledge of the law, and such training and experience, that they may reasonably be supposed to be competent to give safe and prudent counsel, and that they are so situated that, if they advise, their action will be disinterested and under a sense of responsibility due to their position, and that they are no longer open to the charge of acting irresponsibly, and with no better means of judging of the rights and duties of a prosecutor than the prosecutor himself.

Unless, therefore, it is improper for magistrates of this description to advise those who approach them with complaints, evidence of the giving of such advice by a magistrate ought not to be excluded. In dealing with this branch of the question, great weight must be given to the usual and settled habits and customs of our people. In regard to formal matters, and in certain kinds of proceedings, the poor, the unlettered, and the unfortunate have been and are accustomed to obtain advice from magistrates and justices of the minor courts, when circumstances make it necessary for them to have recourse to the law. This feature of our judicial system has been well known, and no indication is found in the legislation which during the last thirty years has abolished most of the judicial powers of justices of the peace, and established the present system of minor courts, that it was wrong or disadvantageous or distasteful to the people. Upon the whole, it is a wise custom, which promotes the wholesome administration of justice, and the exercise of which may be safely left in the hands of such magistrates. While all magistrates should, so far as possible, keep themselves unbiased, and should

counselor at law, the case is not governed by the decision in *Olmstead v. Partridge*, 16 Gray, 381. We agree entirely with the principles of that decision, and with their statement and discussion by the distinguished jurist by whom the opinion was written. At the same time it is a question whether the judicial system of the commonwealth has not, since the time of that decision, been so changed and improved in respect to the learning, capacity, and standing in the community of the magistrates now intrusted with the power of issuing warrants in criminal cases, that the conclusion then reached, that evidence that the complainant acted upon the advice of a justice of the peace who was not a counselor or attorney at law was incompetent to disprove malice, ought to be now reconsidered.

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The law wisely requires that a party who has instituted a groundless suit against another should show that he acted on the advice of a person who, by his professional training and experience, and as an officer of the court, may be reasonably supposed to be competent to give safe and prudent counsel, on which a party may act honestly and in good faith, although to the injury of another. But it would open the door to great abuses of legal process if shelter and protection from the consequences of instituting an unfounded prosecution could be obtained by proof that a party acted on the irresponsible advice of one who could not be presumed to have better means of judging of the rights and duties of the prosecutor on a given state of facts than the prosecutor himself." We believe that it is now a commonly recognized fact that the magistrates authorized to issue warrants in this commonwealth have such knowledge of the law, and such training and experience, that they may reasonably be supposed to be competent to give safe and prudent counsel, and that they are so situated that, if they advise, their action will be disinterested and under a sense of responsibility due to their position, and that they are no longer open to the charge of acting irresponsibly, and with no better means of judging of the rights and duties of a prosecutor than the prosecutor himself.

Unless, therefore, it is improper for magistrates of this description to advise those who approach them with complaints, evidence of the giving of such advice by a magistrate ought not to be excluded. In dealing with this branch of the question, great weight must be given to the usual and settled habits and customs of our people. In regard to formal matters, and in certain kinds of proceedings, the poor, the unlettered, and the unfortunate have been and are accustomed to obtain advice from magistrates and justices of the minor courts, when circumstances make it necessary for them to have recourse to the law. This feature of our judicial system has been well known, and no indication is found in the legislation which during the last thirty years has abolished most of the judicial powers of justices of the peace, and established the present system of minor courts, that it was wrong or disadvantageous or distasteful to the people. Upon the whole, it is a wise custom, which promotes the wholesome administration of justice, and the exercise of which may be safely left in the hands of such magistrates. While all magistrates should, so far as possible, keep themselves unbiased, and should

ordinarily refrain from expressing an opinion on matters which are to come before them judicially, there are cases in which they are to exercise discretion, and are required to take preliminary action, when they may properly state their views in reference to the phase of the case presented. Upon the question whether, under certain circumstances stated, a formal complaint of this or that character ought to be made and a warrant issued, we cannot say that it is improper for such magistrates to give advice, and it follows that no good reason now exists why, in this commonwealth, evidence that a complaint was made upon the advice of such a magistrate should be inadmissible upon the question of probable cause.

We are not to be understood as now deciding that such advice is equivalent as a protection to the advice of a counselor at law retained by the prosecutor and acting under the usual responsibility to his client and to the courts. But we do think that it is a circumstance tending to show that the prosecutor acted in good faith and with probable cause for his action, and that the jury should be allowed to consider it, and to give it such weight as it may deserve.

Exceptions sustained.

MALICIOUS PROSECUTION — ADVICE OF MAGISTRATE AS EVIDENCE OF PROBABLE CAUSE. — If the prosecutor, before instituting a prosecution, fully and fairly stated the facts to a justice of the peace, and was advised by him that they constituted a reasonable cause for the arrest of the plaintiff, and he honestly acted in good faith, under such advice, no action can be sustained for the prosecution: *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep. 174. See also *Ross v. Hixon*, 46 Kan. 550; 26 Am. St. Rep. 123, and note 146, where the cases discussing this subject are collected, and shown not to support the rule as stated in the California case.

COMMONWEALTH v. RYAN.

[155 MASSACHUSETTS, 523.]

LARCENY. — FOR A SERVANT TO CONVERT PROPERTY DELIVERED TO HIM BY A THIRD PERSON for his master is not larceny, provided he does so before the goods have reached their destination, and something more has happened to reduce him to a mere custodian; while, on the other hand, if the property is delivered to the servant by his master, the conversion is larceny.

EMBEZZLEMENT. — IF A SERVANT RECEIVES MONEY FROM THE SALE OF GOODS OF HIS MASTER and drops it into a money-drawer of a cash register, having an intent to appropriate it, and slips it into the drawer for his own convenience in keeping it for himself, his subsequently taking it

from the drawer and appropriating it to his own use is not larceny, but embezzlement; nor is the fact that the money had been furnished by the master to a detective for the purpose of making the purchase, and thereby fastening the crime on the servant, make his offense any less an embezzlement.

PROSECUTION for embezzlement. The defendant had been employed by one Sullivan, a member of a partnership. Two detectives were employed to proceed to the liquor-store in which defendant worked, for the purpose of purchasing liquors from him with certain marked moneys belonging to Sullivan. The detectives having purchased the liquor, and paid the moneys therefor to the defendant, he dropped them into the drawer of a cash register. He did not, however, register the sale; and after making another sale, he took the money from the drawer. The detective then gave a signal, and the defendant was charged with the offense and arrested. Upon these facts the judge was requested to charge that if any offense had been committed, it was larceny, and not embezzlement, but he refused to so charge, and the defendant excepted. The defendant requested the judge to charge the jury as follows: "1. If the jury should find, upon all the evidence, that the defendant placed the money received for the sale of the whisky and brandy in the money-drawer, then any subsequent taking by him of that money, or other money, out of the drawer would not be embezzlement, and the defendant cannot be convicted upon this complaint. 2. If the money intrusted to the detective by Sullivan, the partner, was the money of said partnership, and the property pretended to be purchased of defendant was still theirs, even if the jury should find that the defendant took said money without returning it to the drawer, or even after returning it to the drawer, still he could not be convicted upon this charge." The judge refused to give these instructions, and, on the contrary, instructed the jury as follows: "If the defendant placed the money received from the detective Lamb in the money-drawer of his employers for the purpose and with the intent of turning over the same to his employers, the money so placed by him in the drawer would, when placed there, be in the possession of his employers, and if the defendant then took the money from the drawer with the intent of depriving the owners of the same, the offense would be larceny, and not embezzlement, and the jury should return a verdict of not guilty; but if the defendant, when he received the three one-dollar bills from Lamb for

the whisky and brandy sold Lamb, or after he received the bills, and before he placed them in the money-drawer of his employers, had the purpose and intent to appropriate the same to his own use, to embezzle them, and, having that purpose and intent, simply placed the bills in the drawer as his own, and for his own personal convenience in the holding and keeping of the same for himself, and not for the purpose of turning over and delivering the same to his employers, such placing of the bills in the drawer would not be such a delivery of the bills to his employers as to make the appropriating of the same to his use larceny, and not embezzlement"; and that "the fact that the three one-dollar bills were taken by Sullivan from his own pocket, and were the money of the employers of the defendant when delivered to Lamb, and were delivered to Lamb for the purpose of trying the fidelity of the defendant, did not change the character of the possession by the defendant so as to make the appropriating of the same to his own use, before they were turned over to his employers, larceny, and not embezzlement."

M. O. Adams, for the defendant.

A. E. Pillsbury, attorney-general, and *C. N. Harris*, second assistant attorney-general, for the commonwealth.

HOLMES, J. This is a complaint for embezzlement of money. The case for the government is as follows: The defendant was employed by one Sullivan to sell liquor for him in his store. Sullivan sent two detectives to the store with marked money of Sullivan's, to make a feigned purchase from the defendant. One detective did so. The defendant dropped the money into the money-drawer of a cash register, which happened to be open in connection with another sale made and registered by the defendant, but he did not register this sale, as was customary, and afterward — it would seem within a minute or two — he took the money from the drawer. The question presented is, whether it appears, as matter of law, that the defendant was not guilty of embezzlement, but was guilty of larceny, if of anything. The defendant asked rulings to that effect, on two grounds: 1. That after the money was put into the drawer it was in Sullivan's possession, and therefore the removal of it was a trespass and larceny; and 2. That Sullivan's ownership of the money, in some way not fully explained, prevented the offense from being embezzlement. We will consider these positions successively.

We must take it as settled that it is not larceny for a servant to convert property delivered to him by a third person for his master, provided he does so before the goods have reached their destination, or something more has happened to reduce him to a mere custodian: *Commonwealth v. King*, 9 Cush. 284; while, on the other hand, if the property is delivered to the servant by his master, the conversion is larceny: *Commonwealth v. Berry*, 99 Mass. 428; 96 Am. Dec. 767; *Commonwealth v. Davis*, 104 Mass. 548.

This distinction is not very satisfactory, but it is due to historical accidents in the development of the criminal law, coupled, perhaps, with an unwillingness on the part of the judges to enlarge the limits of a capital offense: *King v. Bazely*, 2 Leach, 4th ed., 843, 848, and note; 1 Leach, 4th ed., 35, and note; 2 East P. C. 568, 571.

The history of it is this: There was no felony when a man received possession of goods from the owner without violence: Glanv., b. 10, c. 13; Year-Book, 18 Edw. IV. 9, pl. 5; 3 Co. Inst. 107. The early judges did not always distinguish clearly in their language between the delivery of possession to a bailee and the giving of custody to a servant, which, indeed, later judges sometimes have failed to do; e. g., Littleton, in Year-Book, 2 Edw. IV. 15, pl. 7; 3 Hen. VII. 12, pl. 9; *Ward v. Macauley*, 4 Term Rep. 489, 490. When the peculiar law of master and servant was applied either to the master's responsibility or to his possession, the test seems to have been, whether or not the servant was under the master's eye, rather than based on the notion of *status* and identity of person, as it was at a later day: See *Byington v. Simpson*, 134 Mass. 169, 170; 45 Am. Rep. 314. Within his house a master might be answerable for the torts of his servant, and might have possession of goods in his servant's custody, although he himself had put the goods into the servant's hands; outside the house there was more doubt; as when a master intrusted his horse to his servant to go to market: Year-Book, 21 Hen. VII. 14, pl. 21; T. 24 Edw. III. Bristol, in Molloy's *De Jure Maritimo*, bk. 2, c. 3, sec. 16; Year-Book, 2 Hen. IV. 18, pl. 6; 18 Edw. IV. 10, pl. 5; Bro. Abr. Corone, pl. 160; Staundeforde, I, c. 15, fol. 25; c. 18, fol. 28; 1 Hale P. C. 505, note. See *Heydon and Smith's Case*, 13 Coke, 67, 69; *Drops v. Theyar*, Poph. 178, 179; *Combs v. Bradley*, 2 Salk. 613; and further, 42 Ass., pl. 17, fol. 260; 42 Edw. III. 11, pl. 13; Ass. Jerus., ed. 1690, c. 205, 217. It was settled by statute 21 Hen. VIII, c.

7, that the conversion of goods delivered to a servant by his master was felony, and this statute has been thought to be only declaratory of the common law in later times, since the distinction between the possession of a bailee and the custody of a servant has been developed more fully, on the ground that the custody of the servant is the possession of the master: 2 East P. C. 564, 565; *King v. Wilkins*, 1 Leach, 4th ed., 520, 523. See Kelyng, 35; Fitzh. Nat. Brev. 91 E; *Bloss's Case*, Moore, 248; Owen, 52; Goulds. 72. But probably when the act was passed it confirmed the above-mentioned doubt as to the master's possession, where the servant was intrusted with property at a distance from his master's house in cases outside the statute, — that is, when the chattels were delivered by a third person. In Dyer, 5 a, 5 b, it was said that it was not within the statute if an apprentice ran off with the money received from a third person for his master's goods at a fair, because he had it not by the delivery of his master. This, very likely, was correct, because the statute only dealt with delivery by the master; but the case was taken before long as authority for the broader proposition that the act is not a felony, and the reason was invented to account for it that the servant has possession, because the money is delivered to him: 1 Hale P. C. 667, 668. This phrase about delivery seems to have been used first in an attempt to distinguish between servants and bailees: Year-Book, 13 Edw. IV. 10, pl. 5; Moore, 248; but as used here, it is a perverted remnant of the old and now exploded notion that a servant away from his master's house always has possession. The old case of the servant converting a horse with which his master had intrusted him to go to market was stated and explained in the same way, on the ground that the horse was delivered to the servant: Crompton, Just. 35 b, pl. 7. See *King v. Bass*, 1 Leach, 4th ed., 251. Yet the emptiness of the explanation was shown by the fact that it still was held felony when the master delivered property for service in his own house: Kelyng, 35. The last step was for the principle thus qualified and explained to be applied to a delivery by a third person to a servant in his master's shop, although it is possible at least that the case would have been decided differently in the time of Year-Books: Year-Book, 2 Edw. IV. 15, pl. 7; Fitzh. Nat. Brev. 91 E; and although it is questionable whether, on sound theory, the possession is not as much in the master as if he had delivered the property himself: *Rex v. Dingley* (1687), stated in *King v.*

Bazeley, 2 Leach, 4th ed., 835, 841, and in *King v. Meeres*, 1 Show. 50, 53; *Waite's Case* (1743), 2 East P. C. 570; 1 Leach, 4th ed., 28, 35, note; *Bull's Case*, stated in *King v. Bazeley*, 2 Leach, 4th ed., 835, 841; 2 East P. C. 571, 572; *King v. Bazeley*, 2 Leach, 835, 841; *Regina v. Masters*, 1 Den. C. C. 332; *Regina v. Reed*, Dears. C. C. 257, 261, 262.

The last-mentioned decisions made it necessary to consider with care what more was necessary, and what was sufficient, to reduce the servant to the position of a mere custodian. An obvious case was when the property was finally deposited in the place of deposit provided by the master, and subject to his control, although there was some nice discussion as to what constituted such a place: *Regina v. Reed*, Dears. C. C. 257. No doubt a final deposit of money in the till of a shop would have the effect: *Waite's Case*, 2 East P. C. 570, 571; 1 Leach, 4th ed., 28, 35, note; *Bull's Case*, 2 East P. C. 572; 2 Leach, 4th ed., 841, 842; *King v. Bazeley*, 2 East P. C. 571, 574; 2 Leach, 4th ed., 835, 843, note; *Regina v. Wright*, Dears. & B. 431, 441. But it is plain that the mere physical presence of the money there for a moment is not conclusive while the servant is on the spot, and has not lost his power over it; as, for instance, if the servant drops it, and instantly picks it up again. Such cases are among the few in which the actual intent of the party is legally important; for, apart from other considerations, the character in which he exercises his control depends entirely upon himself: *Sloan v. Merrill*, 135 Mass. 17, 19; *Jefferds v. Alvard*, 151 Mass. 94, 95; *Commonwealth v. Drew*, 158 Mass. 588, 594.

It follows from what we have said that the defendant's first position cannot be maintained, and that the judge was right in charging the jury that if the defendant, before he placed the money in the drawer, intended to appropriate it, and with that intent simply put it in the drawer for his own convenience in keeping it for himself, that would not make his appropriation of it, just afterwards, larceny. The distinction may be arbitrary, but as it does not affect the defendant otherwise than by giving him an opportunity, whichever offense he was convicted of, to contend that he should have been convicted of the other, we have the less uneasiness in applying it.

With regard to the defendant's second position, we see no ground for contending that the detective, in his doings, was a servant of Sullivan, or that he had not a true possession of the money, if that question were open, which it is not. The only

question reserved by the exceptions is, whether Sullivan's ownership of the money prevented the defendant's act from being embezzlement. It has been supposed to make a difference if the right of possession in the chattel converted by the servant has vested in the master previous to the delivery to the servant by the third person: 1 Eng. Crim. Law. Com. Rep. (1834) 31, pl. 4. But this notion, if anything more than a defective statement of the decisions as to delivery into the master's barge or cart (*Rex v. Walsh*, 4 Taunt. 258, 266, and *Regina v. Reed*, Dears. C. C. 257), does not apply to a case like the present, which has been regarded as embezzlement in England for the last hundred years: *Bull's Case*, stated in *King v. Bazeley*, 2 Leach, 4th ed., 835, 841; 2 East P. C. 571, 572; *King v. Whittingham*, 2 Leach, 4th ed., 912; *King v. Hodge*, 2 Leach, 4th ed., 1033; Russ. & R. 160; *Regina v. Gill*, Dears. C. C. 289. If we were to depart from the English decisions, it would not be in the way of introducing further distinctions: See *Commonwealth v. Bennett*, 118 Mass. 448, 454.

Exceptions overruled.

EMBEZZLEMENT — LARCENY — DISTINCTION BETWEEN, IN CASES OF CONVERSION BY SERVANTS. — Under the English statutes, and statutes similar to these, it is maintained that, to constitute embezzlement on the part of a servant, the thing embezzled must not have come into the master's hands before it came into the servant's hands; if it did, the conversion of it, whether delivered to the servant by the master or not, is larceny, and not embezzlement. The thing embezzled must be delivered to the servant by a third person, in order that the servant may have such possession of it as to be guilty of embezzlement. The possession of the servant is that of the master in all cases, except when the possession is delivered to the servant by a third person in the master's behalf: See extended note to *Oalkins v. State*, 98 Am. Dec. 127, 128, where the cases maintaining the above distinction are collected. *Commonwealth v. Berry*, 99 Mass. 428, 96 Am. Dec. 767, and note, draws the same distinction; note to *State v. Holmes*, 57 Am. Dec. 284, 285, discussing larceny by a servant. A servant employed on a farm, having the care and custody of a mule belonging to his master, is guilty of larceny if he fraudulently converts it to his own use and sells it: *Crocker v. State*, 86 Ala. 64; 11 Am. St. Rep. 18, and note.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

PLUMMER v. GOULD.

[21 MICHIGAN, 1.]

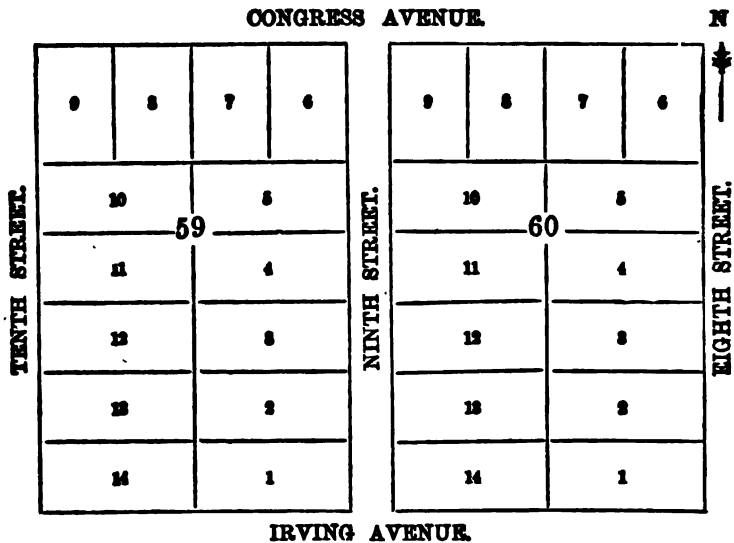
DEEDS. — **IF A GENERAL DESCRIPTION IS FOLLOWED BY A CLAUSE SUMMING UP the intention of the parties as to the premises conveyed, such clause has a controlling effect upon all prior phrases used in the description.**

Tarency and Weadock, for the appellant.

Hanchett, Stark, and Hanchett, for the respondents.

LONG, J. Plaintiff brought ejectment for a strip of land between blocks 59 and 60 of Hiram C. Driggs's plat of the Penoyer farm as an addition to the city of Saginaw, in the state of Michigan. The strip in controversy is called "Ninth Street" on the plat, and is described in the declaration as "all that certain piece or parcel of land situate, lying, and being in the city of Saginaw, in said state, and known and designated as 'Ninth Street,' being sixty-six feet in width, and extending from the north line of 'Irving Avenue,' so called, on the south, to the south line of 'Congress Avenue,' so called, on the north, and through and between blocks number 59 and 60 of Hiram C. Driggs's plat of 'Penoyer farm,' so called, of record in the office of the register of deeds for Saginaw County, Michigan, which said premises the plaintiff claims in fee."

The following is a plat showing the situation of the premises:—



The parties claim title from the common grantor, Hiram C. Driggs.

It appears that on November 25, 1864, Hiram C. Driggs, being sole owner of 320 acres of land on sections 23 and 24, township 12 north, of range 4 east, platted it into blocks, lots, and streets as an addition to the city of Saginaw. The piece of land in controversy is a portion of one of the streets so platted. This plat was executed and recorded in accordance with the act of 1839, then in force. The act provides that the owner shall cause a true map to be made by a surveyor, acknowledged by the owner and surveyor, and shall cause the same to be recorded before any lots therein are offered for sale, and provides a penalty for any sale before such platting and recording; that such platting and recording shall be deemed a sufficient conveyance to vest the fee of such parcels of land as are therein expressed, named, or intended for public uses in the county, in trust to and for the uses and purposes therein named; that proceedings may be had before the circuit court, under certain conditions, to vacate the plat, or parts thereof, wherein notice to all persons interested shall be given; and if the plat, or any portion of it, is vacated, the streets or alleys vacated shall attach to the lots bordering on such streets or alleys, and the title thereto shall vest in the persons owning the property on each side to the center of such street or alley: Howell's Stats., c. 32.

On November 22, 1865, Hiram C. Driggs, the proprietor of the plat, conveyed, by a quitclaim deed, "the equal undivided one-third part of all the right, title, interest, claim, or demand" of himself in those certain parcels of land known as "Penoyer farm," described as northeast quarter of section 23 and northwest quarter of section 24, township 12 north, of range 4 east, and other land, to John F. Driggs. On May 27, 1869, Hiram C. Driggs and wife conveyed, by warranty deed, to John F. Driggs a large number of lots and blocks in said "Penoyer farm," and, among others, the lots bordering on the strip of land in controversy, in blocks 59 and 60, as indicated on the plat heretofore set out. The property was described in the conveyance as "on the plat of 'Penoyer farm,' so called, in the city of Saginaw; the said plat being recorded in the office of the register of deeds on the twenty-fifth day of November, 1864, in liber No. 38 of Deeds, at page 78, and to which reference is here made. The parties to this instrument are tenants in common of the above-described property, and executed the same as a partition deed."

On November 18, 1871, John F. Driggs and wife executed and delivered to Erastus F. Gould, one of the defendants in this suit, a mortgage upon a number of lots and blocks in Penoyer farm, and, among others, the lots bordering on the strip of land in controversy, describing the lots and blocks as "in the recorded plat of the Penoyer farm, in the city of Saginaw and county aforesaid."

This mortgage was foreclosed, and title thereunder to all the property described in the mortgage passed to Erastus F. Gould, April 18, 1879. In the commissioner's deed the lots are referred to as "in the Penoyer farm, Saginaw City, Michigan, according to the recorded plat of said Penoyer farm in the office of the register of deeds for Saginaw County, Michigan."

On June 9, 1890, Erastus F. Gould conveyed to James B. Peter, the other defendant, by warranty deed, certain lots and blocks in said Penoyer Farm, among others, the lots bordering on the strip in controversy, and described "as designated on the map or plat of an addition to the city of Saginaw, Michigan, known as the 'Penoyer farm,' said map or plat being in common use, and of record in the register's office."

The land within this plat has been assessed by lots and blocks ever since 1864.

The plaintiff's case is based solely upon a conveyance made

April 19, 1880, by the heirs of John F. Driggs to himself and A. T. Bliss and brother, and a deed from Bliss and Brother to him. The consideration expressed in this first deed is the sum of one dollar and other valuable consideration to them in hand paid, the deed conveying certain lands by specific descriptions. None of these descriptions cover the land in controversy here. The deed contains a clause conveying lands not specifically described, as follows: "And the said first parties do hereby convey to said second parties all their right, title, claim, and interest in and to any and all lands situated in said Saginaw, Gratiot, Genesee, Shiawassee, Tuscola, and Bay counties to which said first parties, as such heirs at law, have or are entitled to any claim or interest therein, all the said lands and premises lying and being in the state of Michigan."

The plaintiff's claim to this strip of land — if he has any claim — arises under this clause in this deed.

The contention upon the part of the defendants is, that no title to the land in controversy here was ever conveyed to the plaintiff himself and A. T. Bliss and Brother, and none intended to be conveyed under the deed, as is evidenced by other recitals, following the one heretofore set out in the deed, as follows: "The purpose and intent of this deed being to convey to the said second parties all and each of the right, title, claim, and interest, either in possession or expectancy, of the said first parties, of, in, and to the above-described premises by virtue of certain deeds of conveyance to the said John F. Driggs, deceased, viz.: One from Lovina Penoyer and others, heirs of Hiram S. Penoyer, of Saginaw City, deceased, dated twenty-ninth day of January, A. D. 1863, and recorded in the office of the register of deeds for said county of Saginaw, in the state of Michigan, in liber 86 of Deeds, at page 84, etc., and one from John Moore, administrator of the estate of said Hiram S. Penoyer, deceased, to Hiram C. Driggs, dated fourth day of October, A. D. 1864, and recorded in the office of the register of deeds aforesaid, in Liber 86 of Deeds, at page 301, etc., and by the said Hiram C. Driggs and his wife conveyed to the said John F. Driggs, deceased, by deed dated eighteenth day of March, A. D. 1873, and recorded in the office of the register of deeds aforesaid, in liber 70 of Deeds, at page 482."

It is contended on the part of the defendants that the effect of the clause commencing, "the purpose and intent of this deed being to convey," etc., in the deed to plaintiff and A. T.

Bliss and Brother, is to limit the interest of the grantees to such interest as their grantors then had under and by virtue of the conveyances specified in such clause, viz., the deed from Lovina Penoyer and others to John F. Driggs, dated January 29, 1863, and from John Moore to Hiram C. Driggs, dated October 4, 1864, and from Hiram C. Driggs to John F. Driggs, dated March 18, 1878. We think this position well taken. The intention of the parties, as gathered from the whole instrument, will control; and in case of a general description followed by a clause summing up the intention of the parties as to the premises conveyed, it has a controlling effect upon all the prior phrases used in the description: *Ousby v. Jones*, 78 N. Y. 621; *Barney v. Miller*, 18 Iowa, 460, 466, 467; *Bates v. Foster*, 59 Me. 157; 8 Am. Rep. 406; 3 Washburn on Real Property, 5th ed., 425; *Witt v. St. Paul etc. Ry Co.*, 88 Minn. 127, 128; *Sprague v. Snow*, 4 Pick. 54, 56; *Bent v. Rogers*, 187 Mass. 192, 194; *Paddack v. Pardes*, 1 Mich. 421; *Ryan v. Wilson*, 9 Mich. 262; *Chapman v. Crooks*, 41 Mich. 595; *Moran v. Lesotte*, 54 Mich. 83; *Jones v. Pashby*, 62 Mich. 621.

It is well stated by defendants' counsel in their brief that plaintiff's grantors, the heirs of John F. Driggs, have no right, title, claim, or interest in the land in question under any of those three conveyances specified by them in their deed which would pass under their conveyance, only as John F. Driggs had at the time of his death by virtue of such three deeds. They had no interest under the deed from Lovina Penoyer *et al.* to John F. Driggs, dated January 29, 1863, because John F. Driggs, during his lifetime, and on November 14, 1864, conveyed to Hiram C. Driggs the northeast quarter of section 23, and the northwest quarter of section 24, township 12 north, range 4 east, which was the land afterwards platted by Hiram C. Driggs as Penoyer farm, and embraced the land in controversy; and the land and premises described in the deed from Hiram C. Driggs to John F. Driggs under date of March 18, 1878, did not embrace the land in controversy.

The court below directed verdict in favor of the defendants, and plaintiff appeals. Inasmuch as plaintiff's grantors had no title to the premises in controversy under the deeds described, nothing passed under their deed to him, so far as the premises in controversy are concerned, and the verdict was properly directed in favor of the defendants.

Several other questions are raised by plaintiff's counsel in their brief, the principal ones relating to the plat, the dedication of the streets mentioned therein, and the acceptance by the public of the streets as public highways. In the view we have taken of the case, these questions do not become important in the present controversy, and we shall not pass upon them.

The judgment must be affirmed, with costs.

DEEDS—CLAUSES OF LIMITATION.—Where the owner of land deeded it, quitclaiming, in the granting clause, all his right, title, and interest, and by a subsequent clause declared that the interest and title intended to be conveyed was only that acquired by him through a certain deed conveying an undivided half, it was held that the grantor's whole interest passed: *Green Bay etc. Canal Co. v. Hewett*, 55 Wis. 96; 47 Am. Rep. 701. So, also, a precise description cannot be limited by general words of intent: *Clement v. Bank*, 61 Vt. 298. Nor can any expression of the grantor's intent overcome the operation of the rule in Shelley's case, where that is accepted: *Fowler v. Black*, 136 Ill. 363.

•LITTAUER v. HOUCK.

[92 MICHIGAN, 162.]

UNRECORDED MORTGAGE—NOTICE TO ATTORNEY AS NOTICE TO CLIENT.—

Although a chattel mortgagee fails to file his mortgage in the proper office for record, yet the mortgaged property is not subject to execution against the mortgagor, issued under a judgment in favor of a third person, for a debt contracted before the execution of the mortgage, when the attorney and agent of such third person had actual notice and knowledge of such mortgage lien prior to the recovery of the judgment, and the levy of execution thereunder.

NOTICE TO AN AGENT OR ATTORNEY is notice to the principal, when it comes to the agent or attorney in such manner that he may communicate it to his principal, or act upon it without any violation of duty.

Pratt and Gilbert, and James Van Kleeck, for the appellant.

Fatio Colt and John E. Simonson, for the respondent.

LONG, J. The defendant, as constable, levied upon a stock of boots and shoes, under an execution issued from justice's court. The execution was in favor of Rindge, Bertsch, & Co., and against Alfred Taylor and Gerald Fitzgibbon. The claim upon which the execution was issued was an account which accrued about September 1, 1889. The defendants in the writ, Taylor and Fitzgibbon, had been partners in the boot and shoe business in Bay City; but their partnership ceased April 15, 1889, Taylor continuing in the business. Alfred

Taylor was a resident of West Bay City, where he had lived for several years. On September 6, 1890, the plaintiff sold to Taylor a quantity of goods, and took a chattel mortgage upon his stock for \$3,024.19, payments to be made, \$1,000 in thirty days, \$1,000 in sixty days, and the balance in ninety days. The mortgage was filed for record in the office of the recorder at Bay City, instead of West Bay City, where the mortgagor resided at the time of its execution. After the defendant seized the goods under the execution against Taylor and Fitzgibbon, the plaintiff, claiming under his chattel mortgage, brought replevin and took possession of the property. On the trial the court directed verdict in favor of the plaintiff for six cents damages.

The only defense on the trial was, that the chattel mortgage, under which plaintiff claimed, was not filed in accordance with the provisions of the statute, and was therefore void as against defendant's claim under the execution.

It appeared upon the trial that Pratt and Gilbert, of Bay City, were attorneys for the plaintiffs in the execution, who resided at Grand Rapids. The claim was sent to Pratt and Gilbert for collection, and received by them November 27, 1890. About the 20th of November, and prior to the time of their receiving this claim, the plaintiff in the present suit had a talk with Mr. Pratt, of that firm, about purchasing some property from him, and told him of this mortgage which he held upon the stock of goods, and where the goods were situated, and the amount of the mortgage. The plaintiff's claim upon the trial was, that although his mortgage was not filed in the proper office, yet the plaintiffs in the execution could not set up that fact as a defense to the mortgage, for the reason that their attorneys and agents had actual notice and knowledge of the mortgage lien prior to the time of their account being put into a judgment, and of the levy of the execution thereunder. After the levy was made and the constable had gone into possession of the goods, plaintiff set up the claim under his mortgage, which defendant refused to recognize. This was before the bringing of the suit of replevin.

Defendant's counsel, at the close of the testimony, requested the court to charge the jury: "Unless the jury find that the mortgage was filed where the mortgagor resided, the defendant is entitled to recover."

This the court refused to give, and raises the only question in the case. Counsel contend that they were entitled to this

request, and that the court was in error in directing a verdict in favor of the plaintiff, under the ruling of this court in *Buhl Iron Works v. Teuton*, 67 Mich. 623; *Corbett v. Littlefield*, 84 Mich. 30; 22 Am. St. Rep. 681; and *Dempsey v. Pforzheimer*, 86 Mich. 652. We do not think the case falls within the ruling made in those cases. In the present case, the debt upon which the judgment was taken and execution levied was contracted prior to the time of the execution of the mortgage, so that the case does not fall within that class of cases where a debt has been created and contracted during the time in which the mortgage has been kept off file in the proper clerk's office. It also appears that the agents and attorneys of the plaintiffs in the execution had actual notice of the existence of the mortgage prior to the time any suit was brought upon the claim for which judgment was entered. We think the rule is well settled that the knowledge of the agent or attorney under such circumstances would be the knowledge of the principal, as such knowledge came to the agent in such a manner that he might communicate it to his principal or act upon it without being guilty of any violation of duty: Wade on Notice, sec. 637. The case falls within the ruling of this court in *Brown v. Brabb*, 67 Mich. 17; 11 Am. St. Rep. 549, and the cases there cited. The case presented here is so fully discussed in that case that a further discussion of the principles there settled need not be entered upon. The court was not in error in directing verdict in favor of the plaintiff.

Judgment must be affirmed, with costs.

AGENCY. — NOTICE TO AGENT IS NOTICE TO PRINCIPAL: See notes to *Trenton v. Pothen*, 24 Am. St. Rep. 228-233, and to *Fairfield Sav. Bank v. Chase*, 39 Am. Rep. 322-331. Recent cases to the same point are *McCormick v. Ocean City Ass'n*, 45 N. J. Eq. 561; *Macomb v. Wilkinson*, 83 Mich. 496; *Smith v. Brown*, 151 Mass. 338; *Coggeswell v. Griffith*, 23 Neb. 334. The test is, whether the information was of a character which it was the duty of the agent to communicate: *Wood v. Rayburn*, 18 Or. 2. The knowledge of the agent, however, can be charged to the principal only when clear proof is made that the knowledge was present in the agent's mind at the time of the transaction which is the subject of consideration: *Slattery v. Schwannsch*, 118 N. Y. 542.

PEOPLE v. RAHER.

[92 MICHIGAN, 166.]

ASSAULT—SHOOTING INTO A CROWD.—When a person shoots a loaded gun into a crowd of persons, with intent to wound any of them, he may be convicted of an assault with intent to do great bodily harm to the person wounded, although he had no specific intent to wound that particular person.

PRACTICE—OBJECTION, WHEN WAIVED.—An objection to the failure of the court to charge the jury upon a specific point cannot be raised for the first time by an assignment of error to the appellate court.

John Power, for the appellant.

A. A. Ellis, attorney-general, and *Charles M. Howell*, prosecuting attorney, for the people.

GRANT, J. The respondent was convicted of an assault with intent to do great bodily harm, less than murder, upon the person of one John Peterson. Other persons besides Peterson were standing near when the respondent fired a revolver, wounding Peterson in the head. The court was requested to instruct the jury that they must find the specific intent to assault Peterson. This request was refused, and the court instructed them that if respondent shot into the crowd with the intention to wound any of them, he might be convicted, notwithstanding he had no specific intent against Peterson.

It has been held that where a prisoner fired a gun in the direction of a crowd, he was guilty of an assault upon each: *State v. Nash*, 86 N. C. 650; 41 Am. Rep. 472; *State v. Myers*, 19 Iowa, 517; *Smith v. Commonwealth*, 100 Pa. St. 324. In *Smith's Case*, Dears. C. C. 559, the prisoner shot at A, supposing him to be B, and intending to kill B. He was held properly convicted of assault with intent to murder. In *Bailey's Case*, Russ. & R. C. C. 1, the prisoner, a captain of a vessel, shot into another vessel. He was indicted for maliciously and willfully shooting at one Truscott, a mariner upon such other vessel. Lord Eldon instructed the jury that if they found the guns were fired at the vessel and those on board her generally, the guns might be considered as shot at each individual on board her, and therefore at Henry Truscott, the person named in the indictment. That case was approved in *Rez v. Lovel*, 2 Moody & R. 39. The contrary doctrine appears to have been held in Arkansas: *Lacefield v. State*, 34 Ark. 275; 36 Am. Rep. 8; *Scott v. State*, 49 Ark. 156. I think the instruction was correct.

The information contained two counts,—one for assault with intent to murder, and the other for assault with intent to do great bodily harm. The court instructed the jury that if they found neither of these intents, they must acquit. It is now alleged as error that the court should have instructed them, that if there was no intent, they might find him guilty of assault and battery. The respondent was defended by attorneys of skill and experience in criminal cases. They submitted to the court nine requests to charge, but no request as to assault and battery. The suit was evidently tried throughout upon the theory submitted to the jury by the court. The objection comes too late.

We find no error in the record, and the conviction is affirmed.

ASSAULT.—One unlawfully firing at A, and hitting B, is guilty of assault with intent to kill B: *Dunaway v. People*, 110 Ill. 333; 51 Am. Rep. 696; *McGehee v. State*, 62 Miss. 772; 52 Am. Rep. 209; *State v. Gilman*, 69 Me. 163; 31 Am. Rep. 257. *Contra*, *Lacefield v. State*, 34 Ark. 275; 36 Am. Rep. 8. Similarly, where one voluntarily fires a gun into a crowd, with the felonious intent of killing another, the unintentional killing, even of a friend of the shooter, is murder: *Gollüher v. Commonwealth*, 2 Duvall, 163; 87 Am. Dec. 493; and where a man, having announced his intention to fire a pistol in the streets of a town, commenced to draw the weapon, and did draw it, after which it was accidentally and prematurely discharged, thereby killing another, he is as guilty of manslaughter as if he had deliberately fired it, and by mere accident another had been killed: *Sparks v. Commonwealth*, 3 Bush, 111; 96 Am. Dec. 196. And, in general, when death results from the commission of an act which shows an abandoned and malignant heart and a recklessness of consequences, the act will be murder: *Mayer v. People*, 106 Ill. 306; 46 Am. Rep. 698.

MALINIEMI v. GRONLUND.

[92 MICHIGAN, 222.]

FALSE IMPRISONMENT—ARREST WITHOUT PROBABLE CAUSE.—When a person is the procuring and directing cause of the arrest and imprisonment of another, by pointing him out and beckoning him to come to an officer, without knowing or inquiring his name or residence, and acting solely on suspicion that he answers a description received by telegram of a person accused of larceny, the arrest is made without probable cause, and the person thus causing it to be made, if mistaken in the identity of the person arrested, is liable in damages for his false imprisonment, although the arrest was caused without malice.

FALSE IMPRISONMENT—JUSTIFICATION FOR ARREST.—A private person has a right to arrest, on suspicion of felony, without a warrant; but if he does so, and it transpires that the wrong man is imprisoned, he must be

prepared to prove, in justification, that a felony had been committed, and that the circumstances under which he acted were such that any reasonable person, acting without passion or prejudice, would have fairly suspected that the person arrested committed or was implicated in the crime.

Clark and Pearl, for the appellant.

E. E. Osborn, for the respondent.

MORSE, C. J. This is an action for false imprisonment, in which the plaintiff recovered judgment for \$750. The only question to be here considered is, whether, upon his own showing, the plaintiff made out a case.

His own story, in substance, is this: He is a native of Finland, and cannot speak English, and understands it imperfectly. He had worked four years in the mines at Ishpeming, and left there on the eleventh day of January, 1891, and went to the city of New York, intending from there to take passage to his native country. The defendant was also a Finn, and agent for a steamboat line in New York. Plaintiff went to defendant's office for a ticket, reaching New York on the 13th of January, 1891. He was arrested in such office on the fourteenth day of the same month. He had talked to Gronlund twice about tickets before he was arrested. The vessel was to leave on Saturday, the 17th of January, 1891. He did not tell Gronlund his name, or where he came from, and Gronlund did not ask him his name or residence. When arrested he was in the back room of Gronlund's office. Defendant came in with a policeman, and beckoned with his hand for plaintiff to come forward, and said that the policeman wished to talk with him. The officer arrested the plaintiff, taking his knife and revolver from him. The police-officer could not speak Finnish. Plaintiff asked defendant what was the matter, and Gronlund told him to go with the officer, and that an interpreter would come when plaintiff wanted him. Plaintiff was put in jail, and kept there until the 1st or 2d of February, 1891, when he was taken by the sheriff of Marquette County to Ishpeming, and there discharged on the 6th of the same month. The man wanted, and for whom plaintiff was mistakenly arrested, was one Jacob Martella, accused of larceny. While he was in jail at New York, Gronlund told him why he was arrested, and also that a man was coming from this state to identify him. Gronlund asked him, while in jail, what his name was, and plaintiff told him. Gronlund said to him, if he was not

the man wanted, not to pay any money to lawyers or sign any papers.

The defendant gives a different version of the transaction, which, if true, would acquit him of all liability for the plaintiff's arrest, as the court instructed the jury. He received a telegram from Ishpeming to have a man arrested, bearing a certain description. He thought that plaintiff filled the description, and replied that the man was there. A policeman afterwards came to the office, and said that he had an order to arrest one Jacob Martella, and asked defendant if he knew any one by that name. Gronlund replied that he did not, but said: "Here is one fellow that answers the description." The officer asked him if he knew where the man was. They went to the back room, and defendant looked through the door, and there were several men sitting there, the plaintiff among them. Gronlund said to the policeman: "'There is a man sitting inside, that resembles the description.' So he instructed me to call the name 'Jacob Martella.' He instructed me to go in, and call very loud, 'Jacob Martella, here is a gentleman wants to see you.' And I went inside and called very loud; I was speaking under his instructions; I said, 'Jacob Martella, here is a gentleman that wants to see you'; and I didn't point at him even; I didn't look at him; I looked at the crowd, but not at him specially; and as quick as I said that he stepped up and asked what was wanted of Martella, or something like that. Then the police detective went to him, and put his hand upon his shoulder, and said, 'Jacob Martella, in the name of the law I arrest you,' and he so received the man."

If the jury believed the statement of Gronlund as a whole, it might be said that the plaintiff was responsible for his own arrest by answering to the name of Martella; but the plaintiff's evidence shows that Gronlund was the procuring cause of his arrest and imprisonment, and that, too, without probable cause, as defendant failed to make the inquiry demanded under the circumstances before pointing him out and beckoning him to come to the police-officer. There was no malice in Gronlund's action, and the court so informed the jury; but for the arrest, and the consequent damage to plaintiff, defendant was plainly responsible, under the plaintiff's showing and the authorities. If it had not been for defendant, plaintiff would never have been arrested or imprisoned. The whole period of plaintiff's imprisonment was the natural result of defendant's acts. According to plaintiff's statement, defend-

ant did more than simply to communicate facts and circumstances of suspicion to the officer, leaving such officer to act on his own judgment. The officer, who is not sworn in the case, evidently acted upon the judgment of Gronlund, and it may well be said that defendant directed the arrest.

A private person has a right to arrest a man on suspicion of felony without a warrant; but if he does so, and it turns out that the wrong man is imprisoned, he must be prepared to show, in justification,—1. That a felony has been committed; and 2. That the circumstances under which he acted were such that any reasonable person, acting without passion or prejudice, would have fairly suspected that the plaintiff committed it or was implicated in it: 2 Addison on Torts, sec. 803, and cases cited. In this case there was no reasonable ground for the arrest, under the plaintiff's showing; and according to the defendant's testimony, he had taken no pains before the arrest to find out who plaintiff was. He did not know his name or where he was from, and did not inquire. His sole ground for suspicion was, that he thought he answered the description sent by telegram, which description he does not give: See *Malcolmson v. Gibbons*, 56 Mich. 459.

The judgment is affirmed, with costs.

FALSE IMPRISONMENT, WHAT CONSTITUTES: See extended note to *Mitchell v. State*, 54 Am. Dec. 258-271. Private person is liable for arrest and false imprisonment if he induces an officer to arrest another without a warrant, and without an offense having been committed in view of the officer, unless he justifies by showing that his charge was well founded: *Veneman v. Jones*, 118 Ind. 41; 10 Am. St. Rep. 100.

ARREST BY PRIVATE PERSON WITHOUT WARRANT: See note to *Kane v. State*, 44 Am. Dec. 293. Such an arrest is excused if felony was in fact committed, and there was reasonable ground to suspect the person arrested; but if no felony was committed, the arrest is illegal: *Brooks v. Commonwealth*, 61 Pa. St. 352; 100 Am. Dec. 645. Compare *Holley v. Mitz*, 3 Wend. 250; 20 Am. Dec. 702; *Brockway v. Crawford*, 3 Jones, 422; 67 Am. Dec. 250.

STUYVESANT v. WILCOX.

[92 MICHIGAN, 232.]

ASSAULT — EVIDENCE OF OWNERSHIP OF PERSONALTY. — When, in an action to recover damages for an assault and battery, it appears that plaintiff had conveyed his farm to defendant in consideration of life support from the latter, and after leaving the farm had returned to get certain personal property claimed by him to be his, but also claimed by defendant to have passed to him under the arrangement between them, and the evidence also shows that the alleged assault originated in the plaintiff's attempt to remove such property after gaining peaceable possession of it, evidence is admissible to show the whole arrangement between the parties, and that title to such personalty never passed to defendant.

TRESPASS. — **OWNER OF PERSONALTY MAY RECAPTURE** and take it into his own possession whenever and wherever he may peaceably do so, and in so doing he will not be guilty of a trespass.

DAMAGES. — **"SMART-MONEY" AS EXEMPLARY DAMAGES,** or any damages by way of punishment merely, cannot be recovered in any case. Damages to be awarded must never exceed compensation for the injury done.

DAMAGES — ASSAULT AND BATTERY — "SMART-MONEY." — In an action for assault and battery, the plaintiff is entitled to recover such exemplary damages as will compensate him for the injury done him by the malicious and wanton act of the defendant, but the latter cannot be punished beyond this by compelling him to also pay "smart-money" as a punishment for such act.

EXEMPLARY DAMAGES — RULE FOR. — In cases calling for exemplary damages, only such an amount can be recovered as will fairly compensate the party entitled to them. "Smart-money" in addition to this cannot be recovered by way of punishment for the wrong done.

L. A. Tabor, and Boudeman and Adams, for the appellant.

E. R. Annable, and Osborn and Mills, for the respondent.

LONG, J. This is an action for assault and battery. Defendant is the son-in-law of the plaintiff. The plaintiff was the owner of eighty acres of land in the township of Decatur, Van Buren County. He was a man seventy-nine years of age. On February 4, 1890, he and his wife executed to the defendant a deed of the farm, and took back from the defendant an instrument in the nature of a mortgage, to secure to the plaintiff and his wife their support during the term of their natural lives. At the time of the making of this deed, plaintiff was possessed of some considerable personal property, and when he and his wife went to live with defendant they took their household effects and other articles of personalty with them. Over this some controversy seems to have arisen, the defendant claiming that in the arrangement the title to the personal property was made over to him as well as the title to the farm. Plaintiff held

defendant's note, and some difficulty also arose in reference to that; the plaintiff claiming that defendant surreptitiously took the note from his possession, after he and his wife went to live with defendant, and refused to surrender it. In April following this transfer, plaintiff and his wife returned from a visit to their son, and advised the defendant that they had come to take their personal effects, as they had concluded not to reside longer with him. They were accompanied by their son and a man by the name of Youngblood. They went into the house, and the defendant refused to allow the plaintiff to take away any of the property, except his and his wife's clothing, claiming that it had been given him by plaintiff for his and his wife's support, and that, having left his house without just cause and against his wishes, the plaintiff was not entitled to the personal property. The plaintiff went out of the house into the barn and got a plane, which was a part of the property taken to the premises by him, and handed it to Mr. Youngblood. Defendant came out and told Youngblood that he should take nothing away from there. He stepped up and took hold of the plane in Youngblood's hands, when the plaintiff also took hold of the plane. Defendant's son was then called by his father to come to his assistance, and he also took hold of the plane with defendant. The four were pulling upon the plane, plaintiff being assisted by Youngblood, and defendant by his son. The plane was a small carpenter's plane, about one foot in length and two inches wide. The claim of the plaintiff is, that during this *mêlée*, the defendant struck him in the right side with his fist, knocking him to the ground. From there he was taken home by his son. A physician was called, and he testified that he found the plaintiff suffering considerable pain, and he discovered a flushed redness on the side where plaintiff claims to have been hurt. Plaintiff claims that he kept his bed two or three weeks after the injury, and that at the time of the trial he was still suffering pain, by reason of this blow.

On the trial, plaintiff had verdict and judgment for twelve hundred dollars.

Defendant brings error. Some sixty errors are assigned.

On the trial the plaintiff was permitted to introduce testimony tending to show that the plane over which the controversy was had was his property. The evidence introduced was the deed of conveyance, the mortgage taken back, and other writings made between the parties, as well as the testimony

of the plaintiff that he never sold to the defendant the personal property, including this plane. The defendant contended that the title to the plane should not be permitted to be shown, and could not be inquired into; that, being in peaceable possession of the plane, and it being on his premises, the plaintiff was a trespasser, whether he was the actual owner or not, in entering upon the premises, and attempting to remove it against defendant's objection and protest. Defendant also contended that he was the actual owner of the plane. This testimony, introduced by the plaintiff, was all under defendant's objection, and many of the assignments of error are based upon the rulings of the trial court in admitting it.

In his general charge, the court directed the jury as follows: "Under the undisputed evidence, at the time of the acts complained of in this case, defendant was upon his own premises, and whatever took place there was brought about by the plaintiff going upon defendant's premises; that is, gentlemen, whatever occurred at the time referred to happened on defendant's own premises. Whether the defendant was justified in doing what was done on that occasion in defense of his possession of his property, or whether what he did there was unjustifiable, depends upon the facts as you may find them to be. Whether the plaintiff or the defendant owned the personal property in controversy depends upon the bargain made between the parties in relation to the support of the plaintiff and his wife by the defendant. If you find that all the terms of that contract were included in the papers introduced in evidence, and that there was no bargain between the parties that the defendant was to have the personal property in question, and further find that there was never any gift or conveyance of this personal property from the plaintiff to the defendant, then the plaintiff would have a lawful right to go upon the premises of the defendant, and take away his (plaintiff's) property, if he could do so without a breach of the peace. He would not be a trespasser in going on such premises, even against the will of the defendant; and if you find that the plaintiff went onto these premises to take away his own property, and that he took an article of such property, namely, the plane referred to, temporarily into his possession, and while endeavoring to carry it away, he was assaulted and beaten by the defendant, then your verdict should be for the plaintiff. If, on the contrary, you find that the plaintiff and his wife turned over to the defendant all of their personal property as part of the consideration for

their support, and that among the other things turned over to the defendant was the plane in question, and that while defendant was in possession of said plane, plaintiff came upon defendant's premises to take it away, and that defendant defended his possession of his property with only so much force as was necessary to retain the possession of his own property, then any injury the plaintiff may have received would not be the fault of the defendant, and you should find a verdict for the defendant. And I give you, in this connection, the defendant's second request, as modified, as follows: 'If you find that the plaintiff, with two other men, came upon defendant's premises, without first asking permission of the defendant to so come there, and without defendant's inviting them there, and openly declared that they had come for the purpose of conveying away certain property there in the peaceable possession of the defendant, which personal property the defendant owned and claimed as his own, then the plaintiff was a trespasser from the time he first came upon the premises.' Also defendant's third request: 'If you find that the plaintiff, with his son Azariah and another man by the name of Youngblood, came upon defendant's premises without permission or consent of the defendant, and then declared that they came to carry away certain personal property then in the peaceable possession of the defendant, and which defendant owned and claimed to own, and while so attempting to carry away such property by force, plaintiff was injured in consequence of defendant's resistance only, then plaintiff could not recover in this action.' That is, gentlemen, the plaintiff cannot recover if you find the facts to be as stated in these requests given, unless the defendant used more force than was necessary to protect himself in the possession of his own property."

The court was not in error in admitting this testimony, or in the charge given upon the subject of the ownership of the plane. Under the claim made, it became an important consideration to determine in whom the title of the plane rested; and to show this, the plaintiff had a right to go into the arrangement between the parties, under which he went to live with defendant upon his premises, and to show that the title to the personal property never passed to the defendant. Plaintiff's testimony showed that the plane was his. He was not a trespasser in entering upon the premises on that occasion. His home was there, under the agreement of the parties, and

if his testimony be true, he was the sole owner of the plane. He had taken it into his possession that morning, and was about to take it away, as he had the right. He was not interfering with defendant's rights in so doing. He had the right, if he owned it, to take it wherever he could find it, subordinate to the preservation of the public peace. He would have no right to commit a breach of the peace in order, even, to recapture his property from a wrong-doer, — one whose possession was tortious. But it is a rule well settled that one has such a right in personal property that he may recapture it and take it into his own possession whenever and wherever he may peaceably do so: Cooley on Torts, 50, 51, and cases there cited.

An assignment of error is also based upon that portion of the charge relative to the measure of damages. After the court had directed the attention of the jury to the claim of actual damages, and that if the plaintiff was entitled to recover, it might be nominal damages merely, if the defendant was the owner of the plane, and the plaintiff was a trespasser in attempting to take it away, and the defendant used more force than was necessary to protect his property, or the jury, under such circumstances, might give him his actual damages suffered, the court then directed the jury: "If, however, you should find that the plaintiff was the owner of the plane, and was trying to remove it from defendant's premises peaceably, and that while so doing defendant assaulted him, and struck him a violent blow, willfully, wantonly, or maliciously, then you would be at liberty to award the plaintiff, not only his actual damages as before described, but also an additional sum for what is termed 'exemplary damages,' 'punitive damages,' or 'smart-money.' These damages are awarded as compensation to the plaintiff, and may include, in a case of this kind, some of the elements of actual damages, namely, physical pain and suffering; and they also include mental suffering, — the mortification growing out of an assault; the mortification of being struck a blow; the sorrow and mental anguish growing out of physical pain and suffering; and these or any other circumstances tending to plaintiff's discomfort may be considered by the jury in assessing exemplary damages; and upon this question I give you the plaintiff's second request as modified: 'The jury are further instructed, that if they find that defendant assaulted the plaintiff, as charged, and that said assault and battery was unprovoked by the

plaintiff, and was maliciously and willfully and wantonly committed on the plaintiff, and the plaintiff was seriously injured and damaged thereby, then the jury, in finding the amount of the plaintiff's damages, are not confined to the amount of actual damages proven, but they may give him, in addition thereto, such exemplary damages or smart-money as in their judgment will be just and proper, in view of all the facts and circumstances proved on the trial.' I also give you the plaintiff's third request: 'In an action of assault and battery, the insult and indignity inflicted upon a person by giving him a blow with anger and rudeness constitutes an element of damages; and in this case, if the jury believe from the evidence that the defendant committed an assault, as charged, and did willfully and wantonly, then, in assessing damages, you may consider, as an aggravation of the wrong, the mental suffering and mortification of the feelings of the plaintiff arising from the insult and indignity of the defendant's blow.'

The defendant complains of this portion of the charge, because the court used the words "smart-money"; that this was tantamount to an instruction that they might punish the defendant in dollars and cents, as well as award to the plaintiff his damages. We must take this charge as a whole on this question of damages, and from it determine if it bears the construction contended for. The whole of the charge relating to exemplary damages is given above. It was held in *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. Rep. 608, that "it is of little consequence by what name the damages given are called, provided the case is one involving that class of injuries for which the plaintiff is entitled to recover. They may be called 'exemplary,' 'punitive,' 'vindictive,' 'compensatory,' or 'added' damages. The important question always is, in every case, Was the character of the wrong suffered, or injury sustained, such as may be lawfully atoned for or compensated in money?"

But this court has never held that one should be compelled to pay "smart-money" as exemplary damages, or any damages by way of punishment merely. Damages to be awarded can never exceed what shall compensate for the injury done. Compensation to the plaintiff is the purpose in view, and any instruction which may lead the jury to suppose that they have the right to go beyond that, and that they may punish the defendant by compelling him to pay "smart-money," is erroneous. The court did, indeed, charge the jury that

"these damages are awarded as compensation to the plaintiff"; but nowhere in the charge did the court instruct the jury that all that plaintiff could claim was the amount which should compensate him for the wrongs he had suffered; and, under the charge as given, the jury might well have understood that they had the right, if they found that the defendant had acted wantonly and maliciously, to punish the defendant in their discretion, and make him "smart" for his illegal, wanton, and malicious conduct. The verdict is twelve hundred dollars. It is a large sum, but it is not within our province to disturb it for that reason; but we should take it into consideration as bearing upon the question whether the jury may or may not have awarded damages by way of punishment. In *Mooney v. Kennett*, 19 Mo. 551, 61 Am. Dec. 576, the use of the words "smart-money," as applied to exemplary damages, was held erroneous. The rule laid down by this court in regard to exemplary damages is harsh enough in many instances, and quite often there is no doubt that the jury, left without any more fixed and definite rule, have visited upon the wrong-doer an amount of damages much beyond the injury suffered, or that which would more than compensate for all the injury done. The rule should not be extended. No rule can be laid down properly measuring or limiting the damages allowable in cases where exemplary damages may be recovered, except, as has been said, "they must not be oppressive, or such as shock the sense of fair-minded men"; but the jury must understand in all cases that they are not justified in going beyond an amount that shall fairly compensate the party entitled to them.

We think the charge open to the objection made. We need not discuss the other errors claimed.

Since the trial in the court below, the plaintiff has departed this life, and his death was suggested of record. The cause of action is one which, by the statute, survives.

The verdict and judgment must be reversed, with costs, and a new trial ordered, which may be prosecuted in the name of the executor or administrator.

ASSAULT. — The owner of personal property may peaceably retake his property from the unlawful possession of another, but the authorities are divided on the question whether force may be employed in the retaking. See the discussion in the extended note to *Barnes v. Martin*, 82 Am. Dec. 673-679. That force may be employed without criminal liability being incurred is held in *Commonwealth v. Donahue*, 148 Mass. 529; 12 Am. St. Rep. 591.

In *Stute v. Boynton*, 75 Iowa, 753, it was held that where a mortgagee is attempting to get possession of the chattels mortgaged, and is resisted by the mortgagor, on the ground that the mortgage is invalid, he must desist from the attempt when he finds that he cannot obtain his purpose without the use of such force as would amount to an assault and battery.

EXEMPLARY DAMAGES, WHEN ALLOWABLE: See the extended notes to *Merrills v. Tariff Mfg. Co.*, 27 Am. Dec. 684-689; *Austin v. Wilson*, 50 Am. Dec. 767-775; *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 870-883. The position on this subject taken by the Michigan supreme court is reviewed on pages 873 and 874 of the last of these notes. In the principal case, that court seems, after some wavering between the opposing doctrines, to have definitely pronounced against the propriety of such damages. Recent cases in which the right of a jury to award exemplary damages is maintained in unqualified terms are *Tatnall v. Courtney*, 6 Houst. 434, and *Conners v. Walsh*, 131 N. Y. 590. In the latter case, a charge that the jury might give "damages that are called exemplary, or punitive, or smart-money, for the purpose of teaching the defendant that he must not maliciously and wantonly assault a person," was held correct. On the other hand, the supreme court of Washington, after an elaborate discussion of the question, has declared that the allowance of exemplary damages will not be tolerated in that state: *Spokane Truck etc. Co. v. Hofer*, 2 Wash. 45; 26 Am. St. Rep. 842.

McPHERSON v. BLACKER.

[92 MICHIGAN, 377.]

CONSTITUTIONAL LAW — ELECTION OF PRESIDENTIAL ELECTORS. — A state statute providing for the election of presidential electors by congressional districts, instead of by the state at large, does not violate section 1 of article 2 of the constitution of the United States, relating to the appointment of such electors by the state. This section must be construed as conferring on the state legislature plenary power to prescribe the method of choosing electors, and not as requiring the state, in appointing them, to act as a unit.

CONSTITUTIONAL LAW — ELECTION OF PRESIDENTIAL ELECTORS. — Under section 1 of article 2 of the federal constitution, the legislatures of the several states have exclusive power to direct the manner in which presidential electors shall be appointed, and such appointment may be made by the legislature direct, by popular vote in districts, or by general ticket, as provided by state statute. This power is not affected by the fourteenth and fifteenth amendments to such constitution. They do not limit the power of appointment to the particular method pursued at the time of their adoption.

CONSTITUTIONAL LAW — ELECTION OF PRESIDENTIAL ELECTORS. — The abandonment, by a state, of an authorized method of choosing presidential electors, and the adoption and exclusive use for a great number of years of another authorized method, does not impair the power of the state to readopt the former method. It cannot, by nonuser, lose the power to exercise rights expressly delegated to it by the constitution of the United States.

CONSTITUTIONAL LAW — ELECTION OF PRESIDENTIAL ELECTORS. — The fact that at the time of the adoption of the fourteenth and fifteenth amendments to the federal constitution the method of choosing presidential electors actually in vogue in all the states was by vote of the people at large for a general ticket does not affect the right of the state to provide by statute for the election of such electors by congressional districts, instead of by the voters of the state at large.

CONSTITUTIONAL LAW — EFFECT OF FIFTEENTH AMENDMENT. — The only limitation placed upon the power of the state by the adoption of the fifteenth amendment to the federal constitution is, that in any case where the right of suffrage is involved, the class protected by this amendment shall not be discriminated against.

CONSTITUTIONAL LAW — ELECTION OF PRESIDENTIAL ELECTORS. — An act entitled "An act to provide for the election of electors of President and Vice-President of the United States," the body of which provides for the election of alternate electors as well as electors, is not in conflict with that provision of the state constitution declaring that no law shall embrace more than one subject, which shall be expressed in its title. It merely provides for filling vacancies caused by the death or disability of the electors. Nor is it invalid for failing to expressly provide for filling a vacancy in case it may occur by the death or disability of both the elector or the alternate; nor because it fails to require notice of the election of district electors provided for, as they are to be chosen at a general election, and the general election law provides that notice shall be given that presidential electors will be chosen at such general election.

CONSTITUTIONAL LAW — ELECTION OF PRESIDENTIAL ELECTORS. — A statute providing for the election of presidential electors by districts, and also providing that the counting, canvassing, and certifying of the votes cast for such electors at large, and for district electors, "shall be done as near as may be as is now provided by law," is not invalid and inoperative on the ground that it fails to provide means for canvassing the votes for such electors in the portions of a certain county which constitute the first, and portions of the second, sixth, and seventh, electoral districts, since such districts are defined by law, and the canvass of the votes cast therein is provided for by the general election law.

CONSTITUTIONAL LAW — ELECTION OF PRESIDENTIAL ELECTORS. — The fact that a state statute providing for the method of choosing presidential electors is in conflict with an act of Congress, in so far as it fixes a date for the meeting of the electors and the method of certifying their action, does not render the remaining provisions of the act inoperative or unconstitutional.

CONSTITUTIONAL LAW — STATUTE INVALID IN PART. — The unconstitutionality of one portion of a statute cannot defeat other portions, unless the nature of the unconstitutional provision is such as to render it of vital importance to the whole statute.

Henry M. Duffield, F. A. Baker, B. M. Cutcheon, and Henry A. Haigh, for the relators.

A. A. Ellis, attorney-general, J. W. Champlin, Otto Kirchner, and T. E. Barkworth, for the respondent.

MONTGOMERY, J. The relators, who are candidates for the office of electors of President and Vice-President placed in nomination by the Republican party, ask for a *mandamus* to compel the respondent to give notice of an election to be held on the first Tuesday after the first Monday in November to fill said offices, under the statute in former years providing for an election of electors by the state at large. The relators allege that act No. 50 of the Public Acts of 1891, known as the "Miner Law," is unconstitutional and void.

It is first averred that the law in question is in conflict with article 2, section 1, clause 2, of the federal constitution, in this: that it attempts to delegate to portions of the state, fixed as districts by the legislature, the power to name electors, whereas the section referred to, it is contended, confers this authority and duty upon the state at large, acting as a corporate unit in its corporate capacity.

Secondly, it is contended that even though the legislature may thus delegate the authority to districts, the law enacted is fatally defective in the following respects: (a) That it violates article 4, section 20, of the constitution of this state, which provides that no law shall embrace more than one object, which shall be expressed in its title, in that it provides for an election of alternate electors, whereas the title relates only to choosing electors; (b) That it fails to provide means for canvassing the votes for electors in those portions of Wayne County which constitute the first and portions of the second, sixth, and seventh electoral districts; (c) That even if the election of alternate electors is valid, the act makes no provision for filling the office in case both the elector and the alternate shall die or become disqualified before performing their duties.

Most evidently, the question of greatest importance is that relating to the true interpretation of section 1, clause 2, article 2, of the federal constitution. The provision of that section is, that "each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress."

On both sides it appears to be conceded that the word "state," as here employed, means the body politic and corporate. On the part of the relators it is contended that the state must, in the choice of electors, act as a unit, and cannot delegate the authority to name electors to any fractional part

of the state, as a district fixed for that purpose alone, or for that and other political action. On the part of respondent it is contended that the section in question gives the legislature plenary power to prescribe how and in what manner the state may choose its electors, whether by the legislature itself, or by all the electors voting for a general ticket, or by electors voting in districts.

In Story on the Constitution (vol. 2, sec. 1472), it is said: "It is observable that the language of the constitution is, that 'each state shall appoint, in such manner as the legislature thereof may direct,' the number of electors to which the state is entitled. Under this authority the appointment of electors has been variously provided for by the state legislatures. In some states the legislature have directly chosen the electors by themselves; in others, they have been chosen by the people, by a general ticket throughout the whole state; and in others, by the people in electoral districts, fixed by the legislature, a certain number of electors being apportioned to each district. No question has ever arisen as to the constitutionality of either mode, except that of a direct choice by the legislature. But this, though often doubted by able and ingenious minds, has been firmly established in practice ever since the adoption of the constitution, and does not now seem to admit of controversy, even if a suitable tribunal existed to adjudicate upon it."

If the question were to be determined solely by reference to the language employed, it may be admitted that there would be much force in the contention that the state must act as a unit, and that no lesser body can be delegated to perform any portion of the duty vested in the state as a body corporate, and it might possibly be held that the words, "in such manner as the legislature thereof may direct," confer only the limited power of directing how the state, acting as an entirety, shall make its appointment. But, in our judgment, these words are clearly susceptible of a construction which confers upon the legislature the power to say how the state action shall be voiced. In such a case, resort is properly had to contemporaneous construction. Judge Cooley, in his work on the constitution, says: "Contemporaneous interpretation may indicate merely the understanding with which the people received it at the time, or it may be accompanied by acts done in putting the instrument in operation, and which necessarily assume that it is to be construed in a particular way. In

the first case it can have very little force, because the evidences of the public understanding, when nothing has been done under the provision in question, must always, of necessity, be vague and indecisive. But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention": Cooley's Constitutional Limitations, 67 (6th ed., 81).

This rule has been so frequently recognized both by this court and the supreme court of the United States as to require little more than a reference to the authorities: *Martin v. Hunter's Lessee*, 1 Wheat. 351; *United States Bank v. Halstead*, 10 Wheat. 63; *Ogden v. Saunders*, 12 Wheat. 290; *People v. Dean*, 14 Mich. 406; *People v. State Treasurer*, 23 Mich. 499; *Detroit City R'y v. Mills*, 85 Mich. 646.

Speaking of this rule, in *Ogden v. Saunders*, 12 Wheat. 290, Mr. Justice Johnson says: "It proceeds upon the presumption that the contemporaries of the constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people when it was adopted by them."

In *People v. State Treasurer*, 23 Mich. 499, it was held that constitutions are to be construed as the people construed them in their adoption, if possible, and the public history of the times should be consulted, and should have weight in arriving at that construction. See also *People v. Harding*, 53 Mich. 481.

The practical construction which was placed upon the section under consideration was certainly such as to maintain the contention of the respondent that the contemporaneous interpretation was, that by this section plenary power was reposed in the legislatures of the several states to prescribe methods for choosing electors other than by a vote of the electors of the entire state, or by any agency which, in the performance of other public functions, represented the entire state.

In the first presidential election, Maryland and Virginia each adopted the district plan. Maryland continued so to choose her electors down to and including the year 1832. Massachusetts, in 1788, adopted a plan of nominating electors in districts by a vote of the people, to whom the legislature was limited in making a choice. In 1796 they were chosen by districts. In New York the method of choosing electors first adopted was by vote of the legislature, but in 1825 the district system was adopted, and was in use in the election of 1828. In North Carolina the district system was adopted in 1803, and in use in 1804 and 1808. In Kentucky the district system prevailed until 1828. In Tennessee the district system prevailed from 1796 to 1836. In Indiana the district system was used in 1824 and 1828. In Illinois the district system prevailed from its admission into the Union until 1827. In Maine, also, the district system prevailed from 1820 until and including the election of 1828. It will be seen, therefore, that the exercise of the right to choose electors by districts began at the first election held under the constitution, and continued to be exercised by some of the states for a period of forty years. Nor was an abandonment of this method due, except possibly in a single instance, to growing doubts as to its constitutionality. The states in which it had been invoked adopted a general ticket method, it is believed, not because of any doubt of the authority to choose electors in districts but in order that more power could be wielded by the state in political conventions. Madison, who acted as a member of the committee which reported to the federal convention the method finally adopted for electing President, in a letter written in 1823, and in which a constitutional amendment which should make the choice of electors by districts imperative was recommended by him, in referring to the action of the convention, said: "The district mode was mostly, if not exclusively, in view when the constitution was framed and adopted, and was exchanged for the general ticket and the legislative election as the only expedient for baffling the policy of the particular states which had set the example": 3 Madison's Writings, 333.

Another persuasive fact in determining whether the intention was to limit the exercise of the right of the state to choose electors to a method which involved action by the state as a unit, is the practical construction placed upon section 2 of article 1, which provides that "the House of Representatives

shall be composed of members chosen every second year by the people of the several states," and that until enumeration shall be made, "the state of New Hampshire shall be entitled to choose three, Massachusetts, eight," etc. There is certainly the same ground for contention that the authority given to a state to choose three or eight representatives involves action by the state as a unit, as there is to say that the provision that each state shall appoint electors in such manner as the legislature thereof may direct, requires action by the state as a unit, and yet, from the time of the adoption of the constitution, the power of the state to provide for choosing representatives by districts has not been questioned, nor has the power to choose by an election at large been questioned (where no law of Congress intervenes), so that there has been a practical construction, which has continued down to this day, which establishes that, under the provisions of section 2, article 1, the state, having authority to choose representatives, has the choice of methods, and may elect by districts or *en masse*.

But it is urged that the fact that the district system has been abandoned is evidence from which it may be inferred that there has been a growing belief in the unconstitutionality of that method; and it is further stated in the briefs of the counsel that "any examination of the history of the methods of choosing presidential electors which approximates philosophic or scientific inquiry can only result in the conclusion that the states, in coming to the use of the general ticket, by a common consent and practice gave to the constitution a construction and a meaning which it might not otherwise now have, but which is nevertheless of the most conclusive and binding character."

There would doubtless be great force in the practical construction which has obtained for sixty years, even though not contemporaneous, if such construction involved, of necessity, a negation of the right claimed by the legislature in this case; but the fact that the several states have provided by their legislatures for choosing electors on a general ticket does not involve an assertion that the power to choose by districts does not exist. And in so far as the argument of counsel assumes that our constitution is subject to growth, it is, in our judgment, inconsistent with the purpose and duty sacredly to maintain the integrity of that instrument, to treat it as subject to modification, except by the prescribed agencies and by the prescribed methods. And especially is it inconsistent

with established rules to say that by nonuser a commonwealth may lose the power to exercise rights expressly delegated in a written constitution. If, under the constitution, and after forty years of practical construction, the state had the right to choose electors by districts, it does not lie with any court to assert that that right has been lost to the state by nonuser.

In *People v. State Treasurer*, 23 Mich. 499, Mr. Justice Cooley, speaking for the court said: "Constitutions do not change with the varying tides of public opinion and desire. The will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that, in order to aid evasions and circumventions, they shall subject these instruments, which, in the main, only undertake to lay down broad, general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power."

It has evidently not been the view of eminent statesmen either that the original construction of this section should have been such as to exclude the power of the legislature to adopt the district method, or that that power has been lost by nonuser, for as late as 1874 the committee on privileges and elections of the United States Senate made a report, in which, speaking of this section, it was said: "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the state at large, or in districts, as are members of Congress, which was the case formerly in many states."

But it is urged that the act in question is in conflict with the fourteenth and fifteenth amendments; and it is said that at the time these amendments were adopted the method of choosing electors actually in vogue in all the states was by vote of the people at large for a general ticket, and as it is provided by the Fourteenth Amendment that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and also pro-

vided that "when the right to vote at any election for the choice of electors for President and Vice-President . . . is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced," and as the Fifteenth Amendment provided that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude," that these amendments are to be held to have relation to the conditions then existing, and that, in effect, they operate to repeal by implication so much of article 2, section 1, as to prescribe the manner of choosing electors.

It would, in our opinion, be a strained construction which should give to either of these amendments the effect to annul the power expressly delegated in section 1, article 2. But here again we are not without the aid of contemporaneous construction. As already pointed out, the committee on privileges and elections of the Senate, composed, as it was, of men who participated in the adoption of these amendments, reported, in 1874, in the most unequivocal terms, that this power still rested with the legislature. The question was also discussed by eminent members of the electoral commission of 1877. Commissioner Frelinghuysen, speaking of the power of the state to appoint electors, said: "Under this power, the legislature might direct that the electors should be appointed by the legislature, by the executive, by the judiciary, or by the people. In the earliest days of the republic, electors were appointed by the legislatures. In Pennsylvania they were appointed by the judiciary. Now, in all the states except Colorado, they are appointed by the people."

Commissioner Hoar said: "Upon the whole matter, therefore, I am of opinion that the appointment of electors and the ascertaining who has been appointed is the sole and exclusive prerogative of the state. The state acts by such agencies as it selects."

Mr. Justice Field said: "The constitution declares that each state shall appoint electors 'in such manner as the legislature thereof may direct.' . . . With the exception of these provisions as to the number of electors and the ineligibility of certain persons, the power of choice on the part of the state

is unrestricted. The manner of appointment is left entirely to its legislature."

Mr. Justice Miller, commissioner, said: "If elected by the legislature, as they may be, an appropriate mode [of certifying the election] would be the signatures of the presiding officers of the two houses to the fact of such appointment, or a certified copy of the act by which they were elected."

In *In re Kemmler*, 136 U. S. 448, it was said: "The Fourteenth Amendment did not radically change the whole theory of the relations of the state and federal government to each other, and of both governments to the people."

See also *Minor v. Happersett*, 21 Wall. 162.

It is very clear that the Fifteenth Amendment was intended to preclude the state from making any discrimination against citizens on account of color. No reasoning could make this plainer than does the mere reading of the provision: "The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."

There is no attempt to place limitations upon the power of the state, except that in any case where the right of suffrage is involved the class protected by this amendment shall not be discriminated against. Neither by the fourteenth nor fifteenth amendment was there any attempt to place limitations upon the authority of the state as to the choice of officers theretofore existing. Presidential electors are still regarded as state officers: *In re Green*, 184 U. S. 377. And to hold that because, at the time of the adoption of the Fourteenth Amendment, the general custom was to elect by the states at large, this secured irrevocably the right of each male citizen twenty-one years of age to vote directly for the number of electors to which the state is entitled would be to hold, also, that the method of choosing state officers, including judicial officers, which at the time of the adoption of this amendment obtained, was irrevocably fixed beyond the power of the legislatures of the several states to change. We do not think the amendment is susceptible of this construction.

Does this act embrace more than one object? and if not, is that object sufficiently expressed in its title? It is held that the provision of the constitution requiring that the object shall be expressed, etc., is fully accomplished when the statute has but one general object, and when such object is fairly indicated by its title. Every end and means necessary to the

accomplishment of the general object need not be provided for by a separate act relating to that alone: *People v. Mahaney*, 18 Mich. 481; *Kurtz v. People*, 33 Mich. 279; *Ryerson v. Ulley*, 16 Mich. 270. The title of this act is, "An act to provide for the election of electors of President and Vice-President of the United States, and to repeal all other acts and parts of acts in conflict herewith."

It is said that the body of the act provides for the election of alternate electors as well as electors, and that alternate electors are not named in the title. It would hardly be contended that it was not competent, under this title, to provide for filling vacancies occasioned by the death or disability of one of the electors first chosen. This act, in effect, does no more than that. Technically, also, alternate electors are, before they become officials vested with any functions whatever, electors. The sole object of their election is, that they shall, in a certain event, exercise the function of electors. The question might be quite different if they were elected to a distinct office, having duties to perform, and with a provision that they should have added to those duties the function of electors in the event of the disability of their principals.

It is also urged as an objection to the validity of this law, that in case of the death or disability of both the elector and alternate, no provision is made for filling the vacancy, and it is therefore claimed to be inoperative. But it is only necessary to say, that if this be true, then any attempt to appoint electors would fail; for, under the former statute existing in this state, and under all statutes vesting power to fill vacancies in the electoral college, death might intervene, and prevent the exercise of that function.

Can the act be said to be inoperative and void because so defective that its provisions cannot be given effect? It is first claimed that the law is defective in not requiring notice of the election of the district electors provided for; but we think this criticism without force. Section 147 of Howell's Statutes remains in force, and by the express terms of that statute the secretary of state is required to give notice that there are to be chosen "as many of the following officers as are to be elected at such general election, viz., a governor, . . . electors of President and Vice-President." The electors provided for in this act are to be chosen at this general election, and it is the plain duty of the secretary of state to give notice of that fact.

It is next urged that the law is defective and inoperative,

for the reason that no means are provided, either by the act itself or the general law, for canvassing votes in Wayne County. The general law (Act No. 190, Laws 1891) provides, by section 1, for inspectors of election for elections at which presidential electors may be voted for. Section 36 provides for a canvass of the votes.

Section 38 requires duplicate statements of the result to be prepared, one copy of which is to be filed, and the other delivered to the inspector appointed by the board to attend the county canvass. Section 184 of Howell's Statutes provides that the board of canvassers shall proceed to canvass the votes, and section 185 requires a statement of votes given for electors of President and Vice-President of the United States each year in which such electors are to be chosen. The act in question, in section 2, provides that "the counting, canvassing, and certifying of the votes cast for said electors at large and their alternates, and said district electors and their alternates, shall be done, as near as may be, in the same manner as is now provided by law for the election of electors of President and Vice-President of the United States."

The precise point appears to be, that as the votes cast in the county for the presidential electors are cast in different electoral districts, there is no provision for a separate canvass of the votes cast in each district by the board of canvassers. We do not see the least difficulty in applying the law. It would, of course, be the duty of the inspectors to designate the district in which the elector is voted for; and as the district is defined by law, there is no more difficulty in canvassing such votes than there is in the board of state canvassers crediting to the one entitled the votes cast in the proper judicial circuit for circuit judge.

The act in question is in conflict with the law of Congress in so far as it attempts to fix a date for the meeting of electors and the method of certifying their action. Does this render the entire act inoperative? There is no doubt of the rule that where a law of a state conflicts with a law of Congress in a matter in reference to which Congress has the right to legislate, the state law must give way to the extent of such conflict: *Robinson v. Rice*, 3 Mich. 242. The law is not necessarily inoperative *in toto* because in some of its provisions the legislature has exceeded its power. On the contrary, the rule is stated to be, that the unconstitutionality of one portion of a statute cannot defeat other portions, unless the nature of the

unconstitutional provision is such as to render it of vital importance to the law: *People v. Mahaney*, 13 Mich. 481. See also *People v. Richmond*, 59 Mich. 570; *Attorney-General v. Amos*, 60 Mich. 372; *Robison v. Miner*, 68 Mich. 549. This general rule is conceded, but it is contended that this statute furnishes evidence upon its face that it contains provisions which would not have been adopted had it been within the understanding of the legislature that the provision relative to the date for the meeting of electors was inoperative. The statute providing, as it does, that "in case two or more persons have an equal and the highest number of votes for any office created by this act as canvassed by the board of state canvassers, the legislature in joint convention shall choose one of said persons to fill such office, and it shall be the duty of the governor to convene the legislature in special session for such purpose immediately upon such determination by said board of state canvassers," it is urged that if it had been understood that the legislature which is to be chosen at the same general election at which the presidential electors are chosen was to convene before the date when, under the law of Congress, the electors are permitted to cast their votes, it is not to be presumed that the legislature would have provided for convening the legislature in special session at large expense. But we are not able to say, as a matter of law, that this is true. The new legislature will sit but three legislative days prior to the date fixed by the law of Congress for the meeting of electors. Nor is it clear beyond question that it was not the purpose and intent of the present legislature to retain the power of choosing the electors in case of tie, rather than to commit it to their successors. We think there are evidences afforded by the act itself that such was their purpose. We cannot therefore say that this statute would not have been passed in the form in which it is without the provision relating to the time of the meeting of the electors, and therefore are not justified in holding that the law is wholly inoperative because of the conflict of that provision with the law of Congress upon the same subject.

We have considered the questions presented with the care which the exceeding importance of the issue seemed to us imperatively to require, and our conclusion is, that the statute must stand as the lawful edict of the legislature. Nearly seventy years ago, Chancellor Kent wrote, in regard to the election of the President, as follows: "The mode of his ap-

pointment presented one of the most difficult and momentous questions that occupied the deliberations of the assembly which framed the constitution; and if ever the tranquillity of this nation is to be disturbed, and its liberties endangered by a struggle for power, it will be upon this very subject of the choice of a President. This is the question that is eventually to test the goodness and try the strength of the constitution; and if we shall be able, for half a century hereafter, to continue to elect the chief magistrate of the Union with discretion, moderation, and integrity, we shall undoubtedly stamp the highest value on our national character, and recommend our republican institutions, if not to the imitation, yet certainly to the esteem and admiration, of the more enlightened part of mankind": 1 Kent's Com. 273.

The danger in this plenary power conferred by the constitution upon the legislatures of the several states has been recognized by the wise and patriotic statesmen of all political parties, and several attempts have been made in Congress to secure an amendment requiring a uniform mode. The language of Chancellor Kent was written shortly after a long debate in the United States Senate over proposed amendments: Ann. Cong. 1823-24, pp. 167, 354, 375. To the intelligence, wisdom, and patriotism of our people is due the gratifying fact that the danger has thus far been averted, but the action resulting in the passage of the act in question is a reminder of the danger which may at any time be precipitated upon the country for the purpose of obtaining political power. The injustice of any other than a uniform system of electing the President of the United States is manifest. As has been recently well said: "It is of the first and last consequence and importance that, in legislating upon this subject, it should not be regarded from a party stand-point."

But neither the fact that this most important consideration may have been overlooked, nor that this legislation may result in serious injustice, can extend our jurisdiction, or justify us in usurping functions which, under the constitution, pertain to the legislature. As was said by Mr. Justice Cassoday, in the recent case of *State v. Cunningham*, 82 Wis. 89: "It is to be remembered that even praiseworthy objects cannot be rightfully attained by a violation of law. Every effort to fritter away the plain language of the constitution, by way of construction or otherwise, even to secure a desirable end, is nothing less than an insidious attempt to undermine the

fundamental law of the state, and hence, to that extent, destructive of good government, besides being vicious in its tendencies."

The writ should be denied.

STATUTES EMBRACING MORE THAN ONE SUBJECT. — Subjects which are germane or subsidiary to the main subject mentioned in the title, or relative directly or indirectly to the main subject, or of the same nature, and coming legitimately under one denomination, may be included in a statute without rendering it invalid: *Fahey v. State*, 27 Tex. App. 146; 11 Am. St. Rep. 182. A similar rule prevails in regard to a title which expresses a minor subdivision of the main subject, which, without such expression, would be held to be included therein: *Hronek v. People*, 134 Ill. 139; 23 Am. St. Rep. 652. See also notes to *Davis v. State*, 61 Am. Dec. 337-346, and *Tuttle v. Strout*, 82 Am. Dec. 110, 111.

CONTEMPORANEOUS CONSTRUCTION OF A STATUTE. — Cases illustrating the maxim, *Contemporanea expositio est optima in lege*, will be found collected in the note to *People v. Freeman*, 13 Am. St. Rep. 145. See also *Connecticut etc. Ins. Co. v. Talbot*, 113 Ind. 373; 3 Am. St. Rep. 655; *Wilson v. Donaldson*, 117 Ind. 356; 10 Am. St. Rep. 48.

STATUTES UNCONSTITUTIONAL IN PART. — An unconstitutional provision in a statute renders such statute void only so far as that provision is concerned, if sufficient remains to effect its object without the aid of the invalid portion: *University of Maryland v. Williams*, 9 Gill & J. 365; 31 Am. Dec. 72; *Fisher v. McGirr*, 1 Gray, 1; 61 Am. Dec. 381; *Brown v. Beatty*, 34 Miss. 227; 69 Am. Dec. 389; *Santo v. State*, 2 Iowa, 165; 63 Am. Dec. 487; *East Kingston v. Towle*, 48 N. H. 57; 97 Am. Dec. 575; *Berry v. Baltimore etc. R. R. Co.*, 41 Md. 446; 20 Am. Rep. 69; *In re Groff*, 21 Neb. 647; 59 Am. Rep. 859.

HEFFRON v. DETROIT CITY RAILWAY COMPANY.

[92 MICHIGAN, 406.]

STREET-RAILWAYS — TRANSFER TICKETS — LIMITATION AS TO TIME OF USING.

— A regulation that a transfer ticket from one line of street-railway to another will not be honored unless presented within fifteen minutes after its delivery to the passenger is not unreasonable, in the absence of any charter, ordinance, or contract obligation on the part of the company to make such transfer, and it is the duty of the passenger receiving such transfer ticket to read it, and, if possible, to use it within the time limited. If he fails to do so, the company cannot be held liable in damages for not honoring the transfer after the time marked upon it has expired, and for ejecting such passenger from the cars without physical injury upon his refusal to pay an additional fare.

STREET-RAILWAYS — TRANSFER TICKETS — LIMITATION AS TO TIME OF USING.

— When a passenger upon a street-railway receives a transfer ticket from one line of road to another, limited in its use to fifteen minutes from the time he receives it, and he takes the first car passing the point of transfer after receiving the ticket, he may recover of the company for being ejected from the car upon his refusal to pay a second fare, even though the time limit marked upon the transfer ticket has expired.

E. S. Grece, for the appellant.

Sidney T. Miller, and Brennan and Donnelly, for the respondent.

MORSE, C. J. The plaintiff sues in trespass on the case, claiming damages on account of his ejection by a conductor from one of defendant's cars.

The declaration, in substance, alleges that on payment by any passenger of the regular fare, five cents, at any point where the cars are boarded on Woodward Avenue, in Detroit, such passenger is entitled to ride on defendant's cars from such point to the Michigan Central depot, and that on payment of said five cents to the Woodward Avenue conductor, such passenger becomes entitled to a ticket to show he has paid his fare on the Woodward Avenue line car, and which ticket entitles such passenger to ride on one of defendant's cars on Jefferson Avenue, from said Woodward Avenue, along said Jefferson Avenue, to said depot; that the plaintiff, on October 8, 1890, boarded one of defendant's cars on Woodward Avenue, and paid the conductor five cents, and received from said conductor a ticket to show that he had paid his fare on the Woodward Avenue car, and which, presented to the conductor of the Jefferson Avenue car, would entitle him to ride to said depot.

"And the plaintiff accordingly rode on defendant's car to Woodward Avenue to the intersection of the Jefferson Avenue line, and a few moments thereafter boarded one of defendant's cars on said Jefferson Avenue to complete his journey, and then and there seated himself in said car to be conveyed to said depot, as aforesaid; yet plaintiff avers, notwithstanding he had paid defendant its legal fare, as aforesaid, on said Woodward Avenue, and had received said ticket and voucher therefor, showing plaintiff had so paid his fare, and was entitled to ride to said depot, as aforesaid, on defendant's car which he had taken, and although he duly presented the said ticket to the conductor of said Jefferson Avenue car, showing his right to ride thereon to said depot, when demanded by said conductor, defendant's agent operating said car, which ticket said conductor then and there refused to accept or receive as satisfaction of plaintiff's fare, and as showing his right to ride on said road in said car, and demanded of plaintiff that he pay another five cents or get off said car, both of which plaintiff then and there refused to do, but in-

sisted that he had paid his fare, and produced his said ticket, and offered the same to the said conductor of defendant's car, as showing that he had so paid his fare, and was entitled to ride on said car to said depot; but the said agent of defendant refused to take said ticket, or acknowledge the same in any way, but, on the other hand, there and then made an assault upon plaintiff, in the presence of several fellow-passengers, and with great force and violence pushed and pulled plaintiff about, violently pushed and forced plaintiff from the said car into the public street and highway, and then and there, in the presence of said divers passengers and persons on the street, accused plaintiff of fraudulently attempting to ride on defendant's car without paying his fare, and unlawfully attempting to obtain a passage on the said car without paying his fare, and of trying to defraud the defendant in so doing."

The proofs show that plaintiff paid his fare, as alleged, upon the Woodward Avenue car, and asked the conductor for a "change-off" ticket to the Michigan Central depot. This ticket showed upon its face that it was "void unless used on October 8, 1890, as indicated hereon." This indication, marked by the pointing of the index finger of a hand, read as follows:—

"This slip will not be honored unless presented at the intersection of Woodward Avenue line and line punched in margin, within fifteen minutes of time punched, for a continuous trip only.
S. HENDRIE, Treas."

The plaintiff testifies that he got off of the Woodward Avenue car at the corner of Woodward and Jefferson avenues, and waited fourteen minutes, and no car coming along or being in sight going towards the depot on Jefferson Avenue, he then went to the post-office, going there on Jefferson Avenue and Griswold Street, mailed some letters, and came back, where he again waited for eleven minutes before he got a car. On presenting his ticket, the conductor told him it was not good. Plaintiff asked what was the matter of it, and the conductor replied, "Read your ticket." Plaintiff said, "I am not obliged to read it." The conductor replied, "They are good only fifteen minutes after they are punched." Plaintiff then said, "I have been waiting a good deal longer than that for your car." The conductor then told him that he must pay the fare or get off the car. Plaintiff refused to pay the fare, and said that he should not get off the car unless he was put off. The conductor then put him off. The plaintiff did not

resist, and was not injured physically. He had the money to pay the fare, but did not think he ought to pay it. He had used these tickets before, but never had read them, and did not read this one before he was ejected from the car.

It will be seen that the proofs did not correspond with the allegations of the declaration, as plaintiff was not given a ticket which entitled him to ride on this car, except within a certain time; and from the declaration it would be inferred that there were no conditions attached to the ticket.

But, under the proofs, if the declaration had made proper averments to correspond therewith, we do not think the plaintiff was entitled to recover. The following section of the ordinance of the city of Detroit was put in evidence:—

“Sec. 80. The tracks upon Jefferson Avenue, Woodward Avenue, Michigan Avenue, and Gratiot Street shall each be considered and run as one route, and subject its passengers to the payment of a single fare each; provided, however, that all cars running north of Jefferson Avenue shall run to and from Jefferson Avenue, and that portion of Woodward Avenue between Jefferson Avenue and the routes intersecting Woodward Avenue shall be considered as making a portion of each of said routes respectively.”

The defendant company was under no obligation, by contract or ordinance, to take the plaintiff upon the Jefferson Avenue line, from off the Woodward Avenue line, to the Michigan Central depot, for the single fare of five cents, except upon the conditions printed on the face of the ticket; nor is there anything unreasonable in the requirement that the ticket must be used within fifteen minutes. The company had the right, under the ordinances of the city, to treat the Jefferson Avenue line as a single road, and to charge five cents fare; but it saw fit to make a continuous fare of five cents from any point on the Woodward Avenue line to the Michigan Central depot, if the transfer was made in fifteen minutes from one line to the other. In this case half an hour, at least, had elapsed. If no car had passed within that time, and the car from which plaintiff was ejected was the first one to pass after plaintiff had alighted from the Woodward Avenue car, the plaintiff may, under a proper declaration, have an action against defendant; but no such state of facts was averred in the declaration in this case. It was the duty of the plaintiff to read the ticket. His failure to read it cannot give him any rights against the defendant which he would not have

had had he read it. And it was also the duty of the conductor not to receive this ticket, and to require the payment of five cents fare, and neither he nor the company could be made liable for putting plaintiff off the car in the manner he was ejected, without physical hurt or damage.

The case is ruled by *Frederick v. Marquette etc. R. R. Co.*, 37 Mich. 342; 26 Am. Rep. 531. This case is much stronger than that, because here there is no question but the conductor gave plaintiff the right ticket, the same ticket given to all others, and which was good, if used according to its terms and conditions.

The case of *Hufford v. Grand Rapids etc. R. R. Co.*, 64 Mich. 631, 8 Am. St. Rep. 859, is distinguishable in this: There the ticket was one purporting, on its face, to cover the distance to be traveled by Hufford. He paid the usual fare between the two places, and the ticket contained no printed exceptions or conditions restricting Hufford from using it at the time he presented it to the conductor. Its infirmity, if any, was not open to Hufford's plain observation, so that he was informed on its face that it was not good. There were punch-marks upon it, but he did not know the significance of them. He asked the station agent about it, who told him the ticket was good. It was sold to him by the company's agent for a good ticket, and it was therefore held to be a good ticket. But there were no such representations to plaintiff in this case. He asked for a "change-off" ticket; he received one, which plainly informed him, upon its face, that it must be used within a certain time, or it would be void.

As long as the defendant had made no contract with the plaintiff to carry him, without exception or conditions, on both lines to the depot for a single fare of five cents, while it had not held out to the public that it would do so, and when it was not obligated so to do by its own charter or the ordinances of the city of Detroit, there was no legal reason why it could not make the regulation that it would carry passengers to the depot on both lines for a single fare of five cents, provided the transfer ticket was used within fifteen minutes after it was punched on the Woodward Avenue line; and there being no legal reason why this restriction should not be made, the passenger who accepts the ticket must abide by its terms.

The judgment is affirmed, with costs.

RAILROADS — RULES AS TO EXPIRATION OF TICKETS. — A railroad passenger ticket, dated, and having the words, "Good only two days after date,"

stamped upon its face, is not valid after the expiration of the two days: *Boston etc. R. R. Co. v. Proctor*, 1 Allen, 267; 79 Am. Dec. 729, and note. A rule of a railroad company limiting the time within which tickets over its road should be used provided that joint tickets should be good for such further time as might be necessary to enable the holders by the regular trains of the road to reach the station to which such tickets were sold, is reasonable: *Johnson v. Concord R. R. Corp.*, 46 N. H. 213; 88 Am. Dec. 199, and note. See note to *Commonwealth v. Power*, 41 Am. Dec. 479.

EVANS v. CALMAN.

[92 MICHIGAN, 437.]

JUDGMENT — MISTAKE IN RETURN OF SUMMONS, WHEN WILL NOT ERROR.

— When a summons issued March 2, 1888, is returnable March 10th thereafter, and the officer's return shows that the summons was served March 2, 1888, the mistake corrects itself, and cannot affect the validity of a judgment based upon such summons.

JUDGMENT AGAINST MARRIED WOMAN — ESTOPPEL. — When a married woman, after personal service of summons, allows judgment to be taken

against her by default upon a note signed by herself and husband, she is thereafter estopped from maintaining a suit in equity to set aside a levy under execution issued on such judgment, on the ground that the judgment is void as to her, because the consideration for the note was not for her individual benefit or for the benefit of her estate.

HOMESTEAD — PROPERTY OF MARRIED WOMAN, WHEN NOT EXEMPT. — When

a married woman owns an undivided interest in land on which are two houses in a condition for occupancy, and rented at the time when the property is seized under execution issued on a judgment against her and her husband, and while they are residing elsewhere, she cannot, in an action to set aside the levy, change the character of the property to a homestead, and claim it as exempt, by saying that she intends, at some future time, to occupy it as a home.

Dumon and Cogger, for the appellant.

C. H. Thrall, for the respondents.

GRANT, J. The defendants Calman and Carlbauch recovered a judgment in justice's court against the complainant and John S. Evans, and obtained a transcript of the judgment, which they filed with the clerk of the circuit court. Upon this transcript execution was issued, and levy made by defendant Merritt, the sheriff, and the land advertised for sale. The land was purchased by complainant and her daughter, each owning an undivided one-half interest. This bill is filed to set aside that levy as a cloud upon complainant's title. Decree was entered dismissing the bill.

The grounds upon which relief is sought are as follows,

viz.: 1. The judgment is void for want of jurisdiction of the justice to render it, because, — (a) The return of the officer who served the summons shows that it was served March 3, 1886, instead of March 3, 1888; (b) The justice's docket does not contain the date of the appearance of plaintiffs by their attorney, nor the date of rendering judgment; 2. The levy was made after the return day of the execution; 3. The judgment was upon a note signed by complainant and her husband, the consideration of which was not for her individual benefit or estate; 4. The property was intended for a homestead, and is therefore exempt.

1. The mistake of date in the return of the officer corrects itself. The summons was issued March 2, 1888, returnable March 10, 1888. The defendant was not, therefore, misled by the officer's return. The date mentioned in the return was an impossible one, and no possible doubt could exist but that the date should be 1888, instead of 1886: *Johnson v. Shepard*, 35 Mich. 121. The justice's docket clearly shows that the date of the appearance of plaintiffs' attorney and the date of rendering judgment was March 10th, under which date all these statements are made.

2. The levy was not made after the return day of the execution, as appears by the record. The execution was issued July 20, 1889; levy was made July 23d of the same year; notice of sale was given June 17, 1890, which notice contained the identical description in the notice of levy. Another levy appears to have been made January 6, 1890, but the description of the land is not the same as in the first notice. Had the sheriff proceeded under the second levy, the proceedings would be void.

3. The defendant was served with the summons, and having failed to make her defense then, as was her duty, she cannot now be heard in a court of equity: *Wilson v. Coolidge*, 42 Mich. 112.

4. The evidence does not sustain complainant's claim of a homestead. She and her husband were living elsewhere. There were two houses upon the property, both of which were rented. The property had been for some time in a condition for occupancy. She cannot now change its character by saying that she intended at some future time to occupy it as a home.

Decree affirmed, with costs.

PROCESS — EFFECT OF MISTAKE IN RETURN. — A misreturn of service is amendable: *Dewar v. Spence*, 2 Whart. 211; 30 Am. Dec. 241, and note. Where a summons, dated July 16th, requires the defendant to appear on the first Monday in July, instead of the first Monday in August, it is not void, upon the appearance of the defendant at the latter date, and may be amended: *Richmond etc. R. R. Co. v. Benson*, 86 Ga. 203; 22 Am. St. Rep. 446, and note. Where a bill was filed May 5th, but the summons bore date April 5th, it was held that the summons would be regarded as having been issued in May, and that the use of the word "April" was a mere clerical error: *Hamer v. Wolfer*, 124 Ill. 435. See extended note to *Malone v. Samuel*, 13 Am. Dec. 173.

JUDGMENTS AGAINST MARRIED WOMEN — CONCLUSIVENESS OF. — As to her separate property, a valid judgment against a married woman is as effective an adjudication as though she were sole: *Nave v. Adams*, 107 Mo. 414; 23 Am. St. Rep. 421, and note; but a judgment against a married woman upon a claim not authorizing a personal judgment against her is void: *Spencer v. Parson*, 89 Ky. 577; 25 Am. St. Rep. 555, and note. For an extended discussion of the validity of judgments against married women, see note to *Caldwell v. Walters*, 55 Am. Dec. 599-611.

KEHOE v. ALLEN.

[92 MICHIGAN, 464.]

MASTER AND SERVANT — NEGLIGENCE OF FELLOW-SERVANT. — When a molder in a factory, called upon to assist in pouring heated metal into molds prepared by other molders in the employ of the master, is injured by the escape of such metal from a defective mold, and it is shown that the molds furnished are numerous, and that no employee is required to use a defective mold, while accidents of the kind stated are of frequent occurrence, the employee thus injured cannot recover from the master, as the negligence, if any, is that of a fellow-servant.

MASTER AND SERVANT — ASSUMPTION OF RISKS. — **SERVANT WORKING OVERTIME** in the line of his employment assumes the usual risks thereof.

William Look and H. F. Chipman, for the appellant.

Wells, Angell, Boynton, and McMillan, for the respondents.

MONTGOMERY, J. Plaintiff sued to recover for personal injuries. The circuit judge directed a verdict for the defendants, and the sole question presented by the assignments of error is, whether the testimony adduced entitled the plaintiff to have his case passed upon by the jury.

The plaintiff is a molder by trade, twenty-seven years old, and has had twelve years' experience in foundry-work. The declaration avers, in substance, that plaintiff was called upon to assist in pouring heated metal into certain molds prepared by others in the employ of defendants, and that he proceeded

to and did pour said heated metal into certain molds prepared as aforesaid; and after plaintiff had completed the pouring, and had filled a part of said molds with such heated metal, and plaintiff had started and partially filled a certain other mold, prepared as aforesaid, the said heated metal ran out of the side of said mold, because the same was improperly made and plugged, and scalded and burned one of the feet of said plaintiff.

Plaintiff's counsel in their brief complain of certain rulings of the court in excluding testimony offered by the plaintiff, but as no error is assigned upon these rulings of the court, we must dispose of the case upon the evidence adduced.

The testimony which was received shows that the molds into which the metal is poured are made by the employees of the defendants; that the mold in question was made by one Stewart. In making these molds, pockets, or flasks, are used to hold the sand in place. In preparing the mold, the two parts of the flask are separated. The upper part of the flask is called the "cope"; the lower, the "drag." The lower half of the pattern is first imbedded in damp molding-sand in the drag. The cope is then placed upon the drag, and damp sand is packed upon the top of the pattern until the cope is filled. The two parts of the flask are again separated, and the pattern is removed. The cope is then replaced upon the drag, and fastened to it with clamps. Within is the hollow space which corresponds to the pattern, and which is to receive the molten iron. Pouring-holes are provided, varying in number according to the size of the proposed casting. Air-holes, or vents, are also made for the escape of gas. The two halves of the flask are rarely, if ever, in perfect union. The flask is intended to retain the bulk of damp sand which makes the mold. It is not intended that the molten iron will come in contact with the wooden sides of the flask. If the mold of sand is not well made, the iron will run out, and burn the edges of the flask. This is shown by the testimony to be common, and the imperfection in the flask in question is shown to have resulted from this cause. When the heated metal escapes, through any imperfection in the mold, it is called a "run-out," and the testimony shows that these run-outs occur frequently, and in a large foundry, like the one in question, one occurs nearly every day. These flasks supplied to the employees are numerous, and there is no evidence that they were required to use the imperfect flask in question.

Under these circumstances, the fault, if any, was the fault of a fellow-servant: See *Rawley v. Colliau*, 90 Mich. 81.

It is claimed that as the plaintiff's usual work was bench-work, he was not a fellow-servant of Stewart, who made the mold in question. But the whole testimony shows that plaintiff was working by the day, and that the day-laborers were frequently called upon to assist in running out these molds, and that the plaintiff himself had before been called upon to perform the same services.

The claim was also made that the plaintiff had finished his day's work before the accident occurred, and that he was required to do this work after he had completed his stint for the day, and it is claimed that some special duty was owing to him by the defendants for this reason; but the testimony shows that the plaintiff had not completed his ten hours' work, and that there was no agreement which excused him from continuing until he had done so. Furthermore, he was in the line of his employment, and even if working overtime was subject to the usual risks thereof.

The judgment will be affirmed, with costs.

MASTER AND SERVANT—ASSUMPTION OF RISKS.—When one engages in the service of another, he assumes, as between himself and his employer, all the ordinary and usual risks incident to the business upon which he is about to enter: *Orman v. Mannix*, 17 Col. 564; *ante*, p. 340, and note with cases collected. See also *Colorado etc. R'y Co. v. Maylon*, 17 Col. 501; *ante*, p. 335, and note. The fact that an employee was advised to go home, but, disregarding the advice, continued to work, and while working in the service of his master was killed, through the neglect of the vice-principal, does not charge the servant with contributory negligence, and does not relieve the master from liability, though had the servant gone home he would not have been exposed to danger: *McEligott v. Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181, and note.

MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT.—A servant assumes all the open and palpable risks of the business, including the negligence of fellow-servants: *Ell v. Northern Pac. R. R. Co.*, 1 N. D. 336; 26 Am. St. Rep. 621. A master is not liable for personal injuries suffered by his servants, through the negligence of his fellow-servants engaged in a common employment, unless the master was negligent in selecting the servant causing the injury, or retaining him after knowledge of his incompetency: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180, and note; extended note to *Adams v. Iron Cliffs Co.*, 18 Am. St. Rep. 455; *Congrave v. Southern Pac. R. R. Co.*, 88 Cal. 360; *Norfolk etc. R. R. Co. v. Donnelly*, 88 Va. 883; *Fraser v. Red River Lumber Co.*, 45 Minn. 235; *Dube v. Lewiston*, 83 Me. 211.

GRAND RAPIDS SCHOOL FURNITURE COMPANY v.
HANEY SCHOOL FURNITURE COMPANY.

[92 MICHIGAN, 568.]

INJUNCTION AGAINST JUDGMENT. — A court of equity will grant an injunction to restrain a manufacturer and patentee from using a judgment fraudulently and collusively obtained as the result of a conspiracy to injure the complainant, who is engaged in a similar manufacturing business, and from claiming that such decree is an adjudication upon the merits as to the validity of such patent, or from using it in any way to influence or threaten any person against purchasing the goods manufactured and sold by the complainant, who is in possession of facts and proofs sufficient to defeat any suit that might be brought for the infringement of such patent.

Taggart, Wolcott, and Ganson, for the appellant.

Taggart and Denison, for the respondents.

LONG, J. The bill of complaint in this case alleges that the complainant is a manufacturing corporation, having its office and manufactory at Grand Rapids; that ever since its organization in 1887, the defendants have been engaged in circulating thousands of circulars containing the statement that the goods of complainant infringed a certain patent issued to the defendant Haney, who was and is the president of the corporation, and threatening to bring suit against any and all persons purchasing or using goods of the complainant's manufacture; that these claims and threats were made in bad faith, and with full knowledge that the patent was invalid, and that the complainant was in possession of facts and proofs sufficient to defeat any suit that might be brought for its infringement; that said threats were made for the purpose of intimidating parties who were likely to be customers of the complainant, and had to a considerable extent accomplished their object, but no suits having been brought for infringement of said patent, the threats had lost their force, and hence a fraudulent and collusive suit had been instituted for the purpose of obtaining a decree which could be used to deceive and intimidate the public; that such decree had been obtained, and the defendants had begun to use it for the purpose aforesaid, and were intending so to use it continuously and on a very large scale, to the great injury of the complainant's business, though the amount of such injury was very difficult to prove or determine by any accurate measure.

The prayer of the bill is, that the defendants may be perpetually enjoined and restrained from stating, publishing, or claiming, in any manner, that the said decree is anything other or different from a decree obtained by collusion, and from claiming that it is an adjudication upon the merits as to the validity of the said Haney patent, and from using such decree in any way or form to influence or threaten any person or party against purchasing the school furniture manufactured and sold by the complainant.

To this bill the Haney School Furniture Company, one of the said defendants, filed a general demurrer, and the case having come on to be heard thereon, the court held that the bill of complaint did not set up any facts giving a court of equity jurisdiction to grant relief, and entered a decree sustaining the demurrer and dismissing the complainant's bill.

From this decree the complainant appeals to this court.

The English courts, by recent decisions, have exercised the injunctive jurisdiction to restrain injurious publications concerning property which operates as a slander of the owner's title, and libelous publications which are injurious to the plaintiff's business, trade, or profession, and the wrongful use of a name by which the public would be misled and the plaintiff injured in his business. Thus far, however, most of the American courts seem unwilling to follow the example of the recent English decisions, and decline to extend the jurisdiction so as to restrain such torts as libels on business, slanders of title, and the like. In Massachusetts the English decisions are expressly repudiated: *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69; 19 Am. Rep. 310; *Whitehead v. Kitson*, 119 Mass. 484. Injunctions to restrain libelous publications concerning plaintiff's business were also refused in *Life Association v. Boogher*, 3 Mo. App. 173; *Mauger v. Dick*, 55 How. Pr. 132; and *Singer Mfg. Co. v. Domestic Sewing Machine Co.*, 49 Ga. 70; 15 Am. Rep. 674.

In the case of *Emack v. Kane*, 34 Fed. Rep. 46, Judge Blodgett allowed the injunction. It appeared that Kane issued and widely distributed circulars, in which he claimed that Emack's goods infringed his patent. He stated that he should not sue Emack, but should bring suits against all customers of Emack, and collect royalty and damages from all of them. Judge Blodgett said: "The gravamen of this case is the attempted intimidation, by the defendant, of complainant's

customers, by threatening them with suits which defendant did not intend to prosecute. . . . If a court of equity cannot restrain an attack like this upon a man's business, then the party is certainly remediless, because an action at law in most cases would do no good, and ruin would be accomplished before an adjudication could be reached."

In the recent case of *Casey v. Cincinnati Typographical Union*, 45 Fed. Rep. 135, the case of *Emack v. Kane*, 84 Fed. Rep. 46, was cited and approved by Judge Sage. It appeared in the Casey case that parties had conspired together to injure the complainant in his business. Circulars were gotten out, and widely distributed, containing threats of pecuniary loss and injury to those who should do business with the complainant. The claim was made in that case, as in this, that equity had no jurisdiction, because the injurious publication was merely a libel on complainant's business, and for any loss which the union inflicted he had a plain and adequate remedy at law. Judge Sage remarked, however, that it is idle to say that such publications are nothing more than libels, and that the only remedy for the injury inflicted is an action at law; that while they have certain characteristics of libels, they are more than libels, and there is no plain and adequate remedy at law for such injuries.

We think the bill in this case states a case materially different from the Massachusetts cases, and the other cases holding that equity has no jurisdiction to restrain a libel. Here, it is claimed and alleged in the bill that Elijah Haney and the Haney School Furniture Company entered into a conspiracy with defendant Bullard to obtain a decree in favor of Haney and against Bullard, which might and should be used by the conspirators to injure the complainant. The fact is recited that in pursuance of such conspiracy, a bill was filed in the United States court for the eastern district of Michigan, and a decree obtained by fraud and collusion, for the purpose of benefiting the trade of the Haney School Furniture Company at the expense of complainant; that the defendants well knew the patent was invalid, and that the complainant was in possession of facts and proofs sufficient to defeat any suit that might be brought for the infringement of said patent.

The prayer of the bill is, not that defendants be enjoined from making whatever claims they see fit concerning their patent, nor from threatening to bring suits, even though such

threats be made in bad faith, but that the defendants be restrained from using a decree, fraudulently and collectively obtained, to the injury of complainant, and from claiming that such decree is an adjudication upon the merits as to the validity of such patent, or from using it in any way or form to influence or threaten any person or party against purchasing the school furniture manufactured and sold by complainant.

The case, as stated in the bill, is certainly more than a mere claim for an injunction arising out of a libel of complainant's business. A conspiracy is claimed to have been entered into between the defendants for the very purpose of injuring the complainant, and that by such conspiracy a false and fraudulent decree was obtained, settling the rights of the Haney School Furniture Company to the patent under which the complainant was and is operating; that the defendants were publishing to the world, and especially to the customers of the complainant, that such decree was valid, the defendants well knowing it to be false and fraudulent; and that, in any court where the complainant had the right to appear and be heard, it could establish the fact that such patent was absolutely void, and that Mr. Haney and the Haney School Furniture Company had no rights under it, and that complainant was legally entitled to its use.

Admitting that the weight of authority in this country is against the proposition that a court of equity has jurisdiction, by injunction, to restrain the publication of a libel upon one's business, it is no answer to the questions here raised. The complainant has no adequate remedy at law, under the circumstances here stated. It cannot be said that it should lie by and wait the slow and uncertain processes of a suit for damages for its redress. Under the charge in the bill, which we must take as true, the complainant is rightfully operating under such patent, and it has no remedy adequate for the fraud and wrong perpetrated upon it, except as aided by a court of equity. The facts stated make a much stronger case than those in *Casey v. Cincinnati Typographical Union*, 45 Fed. Rep. 135, calling for the aid of the injunctive power of a court of equity.

The decree of the court below must be reversed, with costs, and the demurrer overruled. The defendants will have twenty days to answer the bill.

INJUNCTION TO RESTRAIN JUDGMENT. — A judgment will not be enjoined unless it appears to be inequitable as between the parties, no matter how irregular were the proceedings under which it was rendered: *Hartford etc. Ins. Co. v. Meyer*, 30 Neb. 135; 27 Am. St. Rep. 384, and note. Equity will enjoin the enforcement of a judgment if any fact exists which shows it to be against conscience to execute the judgment; *Hibbard v. Eastman*, 47 N. H. 507; 93 Am. Dec. 467, and note with cases collected. Equity will restrain the enforcement of a judgment obtained by fraud, accident, or mistake: *Bridgeport Sav. Bank v. Edridge*, 28 Conn. 556; 73 Am. Dec. 688, and note.

CASES
IN THE
SUPREME COURT
MINNESOTA.

ALTEN v. TARBOX.

[48 MINNESOTA, 12.]

MECHANIC'S LIEN AGAINST THE PROPERTY OF A MARRIED WOMAN. — If a married woman enters into a contract for the sale of real property, one of the provisions of which is that the vendee shall build a dwelling thereon, and such contract is invalid because her husband did not join therein, but the vendee enters into an agreement, with her knowledge and consent, for the building of the foundation of such dwelling, the contractor with whom this agreement is made is entitled to a mechanic's lien against the property, which he may enforce against the married woman, though the contract of purchase could not have been enforced against her, and has been abandoned.

ACTION to enforce a mechanic's lien against the property of Eve Tarbox, a married woman. She had, in the year 1890, entered into a contract with one Olson to convey the property to him, in which contract he had agreed with her to build a house on the property purchased. This contract was invalid under the laws of Minnesota, because her husband did not join therein. The purchaser, Olson, however, while claiming under the contract of purchase, entered into an agreement with plaintiff to dig a cellar and build a cellar wall, and plaintiff, under such agreement, did work of the value of \$235, but Olson afterwards abandoned his contract and surrendered the lot. It was claimed, — 1. That the lien could be enforced, under section 4 of chapter 200 of the statutes of 1889 (Minn. Rev. Stats. 1891, sec. 4301), which, in substance, provides that whenever the owner of land has sold the same upon an executory contract contingent upon or providing for the erection, construction, alteration, removal to, or repair

upon such land, by the vendee, of any house or other building or structure, such vendee shall be deemed the owner of such house or other structure; or 2. That if the liability could not be maintained under this section, it might be maintained under section 5 of the same chapter: See Gen. Stats., sec. 4300. The latter section declares, in substance, that every house or other structure erected, constructed, altered, removed, or repaired upon any land, with the knowledge of the owner of such land, shall be held to have been erected, constructed, altered, removed, or repaired at the instance of such owner, so far as to subject his interest to a lien therefor. The trial court entered judgment in favor of the plaintiff for the amount prayed for, and declared such amount to be a lien upon the interest of Eve Tarbox, and thereupon she appealed.

Warner, Richardson, and Lawrence, for the appellant.

Louis M. Hastings, for the respondent.

COLLINS, J. Action to enforce a mechanic's lien. The defendant Eve Tarbox, as owner of the real property in question, entered into an executory contract of sale thereof with defendant Olson, contingent upon and providing for the erection of a dwelling-house upon the premises by the latter. She was then a married woman, and her husband, defendant J. B. Tarbox, did not join with her in the written contract. Plaintiff, under an agreement with Olson, built a foundation for the dwelling on the land. The latter then abandoned his contract with Mrs. Tarbox, and plaintiff, seeking to enforce a lien upon the land, relies upon the provisions of Laws 1889, chapter 200, section 4; or, should the provisions of section four (4) be held inadequate or inapplicable, he contends that his right to a lien is assured by one of the findings of the court, as well as by the terms of section five (5).

1. The extremely plain and unambiguous language found in section two (2) of the so-called "Married Woman's Act" (Gen. Stats. 1878, c. 69) has been discussed by this court on more than one occasion. The statute is explicit, and no conveyance or contract for the sale of real estate, or of any interest therein (with certain exceptions, of no moment here), made by a married woman is valid, unless her husband joins—that is, unites—in the execution of the conveyance or contract. The cases on this point are referred to in *Nell v. Dayton*, 43 Minn. 242. The executory contract mentioned in

section four (4) must be—to give effect to other provisions of the section—a valid and enforceable one. As that executed by Mrs. Tarbox was not, the conclusion is inevitable that plaintiff cannot recover as against her, under section four (4).

2. It has been urged by counsel for plaintiff that by virtue of a more recent statute—“An act to declare and protect the legal personal identity of married women,” now chapter two hundred and seven (207), Laws 1887—a *feme covert* has been empowered to enter into a valid contract with respect to, or to convey, her real estate independently of her husband. This act is exceedingly general in its terms, and what was sought to be accomplished by, or what real or fancied injustice was to be met and vanquished by, its passage seems difficult to conjecture. But we have no reason to suppose that there was any intention whatsoever on the part of the law-makers to change, and by indirection sweep away, the express and well-understood terms of the statute respecting conveyances and contracts for the sale of real property by married women. So vague and uncertain an enactment cannot be given the radical construction demanded by plaintiff's counsel.

3. The trial court found, among other facts, that the written instrument, made a part of the findings, was the result of negotiations conducted by Mr. Tarbox with defendant Olson, and that both husband and wife—defendants Tarbox—knew that plaintiff was performing the work in question during its progress, and that neither made objection. While the writing was invalid as a contract to convey real property, it was properly received in evidence, as tending to establish the plaintiff's contention that his work was done not only with the knowledge and assent of Mrs. Tarbox, but at her special instance. Proof that she knew of and assented to the performance of the labor, and that she requested or solicited that it be done, was competent, and could be made, undoubtedly, through the medium of a written contract, which, as to her, was invalid and non-enforceable as a contract to convey. That a married woman may authorize or contract for the erection of a building upon her separate estate, and thereby render it subject to the lien of a mechanic or material-man, notwithstanding her coverture, has been the law of this state for many years: *Tuttle v. Howe*, 14 Minn. 145; 100 Am. Dec. 205. And that the plaintiff's work was performed under a

contract with a vendee who held nothing but an invalid agreement with his vendor, the same having been performed with the assent and knowledge and at the instance of the vendor, cannot be allowed to affect the mechanic's right to a lien: See *Little v. Willford*, 31 Minn. 173.

The case, then, is one wherein a married woman has entered into an invalid and non-enforceable contract, as to herself, for the sale of real property, but in which she has required of the vendee the erection of a building upon the property. Because of the requirement, the vendee has made a contract with this plaintiff which the vendor herself could have entered into or authorized, and thereby have subjected her estate to the lien demanded herein. With her knowledge and assent, and that of her husband, the plaintiff built a stone wall upon the bargained premises, on which all interested parties supposed and intended a superstructure should be placed, as had been agreed upon by express terms in the invalid contract. He is now attempting to enforce a lien claim upon the property as against the interest of one who, although pretending and probably intending to enter into a valid executory contract of sale of the character specially provided for and regulated by section four (4), — under which the plaintiff would have had a right of lien upon the forfeiture or surrender of the contract had it been valid, — has failed or omitted so to do. His right to assert the lien is therefore dependent upon some other provision of the law, if it exists. On reading chapter two hundred (200) it will be noticed that there has been a slight change in the phraseology of the sections which, generally speaking, confer the right of lien. Instead of making the right to depend upon a contract or agreement with the owner, as has been the case heretofore under the statutes, the right has been given and conferred, by the terms of the new law, whenever labor has been performed or materials have been furnished by virtue of a contract with or at the instance of the owner. Save as to this change, and the introduction of section four (4) — a new feature of the lien law, and which has been construed in *Nolander v. Burns*, 48 Minn. 13 (just decided) — and of section five (5), — another new feature in this state, in which it is provided, in effect, among other things, that every building erected upon land, with the knowledge of the owner thereof, shall be held to have been erected at the instance of such owner, — the section not applying, however, to such vendors as are mentioned in section four

(4),—so as to subject his interest in the land to a lien unless he give notice to the contrary,—the law of 1889 is substantially that which preceded it (Gen. Stats. 1878, c. 90), and under which the case of *Hill v. Gill*, 40 Minn. 441, was decided. As before stated, section four (4) has no application here, and we fail to see why we need to construe or apply any of the provisions of section five (5). It is not a case where work and labor have been performed or materials furnished with the mere knowledge of the owner of the land, in which case, and by reason of this knowledge alone, the statute declares that such work and such materials shall be held to have been done and furnished at his instance,—that is, on his application, or at his solicitation,—but it is a case wherein it clearly appears that the lien claimant has acted with the assent of the land-owner, she having full knowledge of his acts as they were performed. His work was done and his materials furnished in order that one with whom she had agreed and attempted to contract might comply with a condition of the supposed contract imposed by her. Her authority for making the improvement, and consent that the work be done and the materials be furnished, that her property might be benefited, is so obvious that, independently of section five (5), the plaintiff's lien claim must be held enforceable, under section one (1), as against her interest in the premises.

It is contended that plaintiff's lien statement was insufficient, in that it did not correctly state the date upon which the work was completed, which was, in fact, on May 26th. This date was fixed as on June 1st in the statement, which was filed within sixty days from the day on which the last item of work was performed. No such hypercritical objection as this can be allowed to stand in the way of the establishment of a claim under a remedial statute, in which an effort seems to have been made to render captious objections and strict technicalities unavailing as instruments for defeating its purposes. The variance as to dates between the lien statement and the proof was clearly immaterial.

Finally, the appellants urge that their so-called "second defense" should have been sustained, and the action dismissed, because of the pendency of another action, previously commenced, to foreclose the same lien.

Conceding, without deciding, that a second action could not have been brought pending an appeal in which a *superseas* bond had been filed, it may be said that it nowhere

appears in the record that prior to the bringing of this action an appeal had been perfected, or a bond filed in the other. The allegations, at best, are, that prior to the entry of any judgment of dismissal, these appellants filed a bond, and perfected their appeal. The answer is scant in its averments, and lacks precision as to when these steps were taken. The former action could have been effectually dismissed and ended, so far as plaintiff's right was concerned to commence anew, without an entry of judgment: *Page v. Mitchell*, 37 Minn. 368; *Nichols v. State Bank*, 45 Minn. 102. If this was the real situation when he began the present action, the facts could not have been interposed as a plea in abatement, because, to render a plea of this kind good, it is essential to aver at least that the appeal was taken and the *supersedeas* filed prior to the commencement of the present suit: *Jenkins v. Pepoon*, 2 Johns. Cas. 312; *Hailman v. Buckmaster*, 8 Ill. 498. It is obvious that the taking of an appeal and the filing of a *supersedeas* bond by these defendants subsequently to the commencement of this action could not be allowed to relate back so as to absolutely deprive the plaintiff of a right which was his, and had been properly exercised, or so as to annul and defeat proceedings taken at a proper time: See *Woolfolk v. Bruns*, 45 Minn. 96.

Order affirmed.

MECHANIC'S LIEN. — MARRIED WOMAN'S SEPARATE PROPERTY is subject to a mechanic's lien, although the contract was made with her husband alone, if she is cognizant of the progress of the work, and consents to its being done: *Bodey v. Thackara*, 143 Pa. St. 171; 24 Am. St. Rep. 526; *Bevan v. Thackara*, 143 Pa. St. 182; 24 Am. St. Rep. 529; *contra*, *Flannery v. Rohrmayer*, 46 Conn. 558; 33 Am. Rep. 36; *Lauer v. Bandow*, 43 Wis. 556; 23 Am. Rep. 571. The basis of the liability, where it is admitted, is the agency of the husband, which is presumed from the subsequent acts of the wife ratifying his arrangements: *Bradford v. Peterson*, 30 Neb. 96; *Howell v. Hathaway*, 28 Neb. 807. In North Carolina the separate estate of a married woman cannot be subjected to the satisfaction of a lien for improvements thereon, although the improvements were made with her knowledge, unless the contract on which the lien is based was executed in the manner prescribed by law: *Thompson v. Taylor*, 110 N. C. 70; *Weir v. Page*, 109 N. C. 220. In Kentucky the contract must be signed by the wife, to make her liable: *Passmore v. Eastin*, 90 Ky. 380. For a case in which the evidence was held to be insufficient to show the wife's knowledge of the contract, or the agency of the husband, see *Cattell v. Fergusson*, 3 Wash. 541. Evidence that the wife saw and conversed about the work is competent: *McCarthy v. Caldwell*, 43 Minn. 442. As to the averments necessary in a mechanic's lien filed on a wife's separate property, see *Shryock v. Buckman*, 121 Pa. St. 248; *Kelly v. McGhee*, 137 Pa. St. 443.

WOODHAM v. FIRST NATIONAL BANK.

[48 MINNESOTA, 67.]

FIXTURES, AS BETWEEN A MORTGAGOR AND MORTGAGEE. — A counter and back bar, the one fastened to the floor and the other to the wall by nails and screws, in a building used as a saloon, are part of the realty, and pass as such on the foreclosure of a mortgage.

Wilkinson and O'Brien, for the appellant.

A. A. Miller, for the respondent.

MITCHELL, J. A Mrs. Beaupre owned a lot and building which she and her husband used and occupied as a hotel and saloon. In the room used as a saloon was a bar consisting of a counter and "back bar," the one fastened to the floor and the other to the wall of the building by nails and screws. The Beaupres mortgaged the realty to one Bush. The mortgage was foreclosed, and the property bid in at the mortgage sale by Bush, who became the owner in fee, and subsequently conveyed to defendant. After Bush had acquired title under the foreclosure, Beaupre executed to plaintiff a bill of sale of all the furniture and saloon-fixtures in the building. Plaintiff claims the bar under this bill of sale. The defendant claims it under his deed. The only question is, whether, upon the above facts, the bar was, as between these parties or those under whom they claim, personal property, or a part of the realty, which passed by the mortgage from the Beaupres to Bush. The general rule as to fixtures between vendor and vendee, mortgagor and mortgagee, is, that all annexations to the realty pass by the deed or mortgage, unless excepted in express terms from the conveyance. In view of the use to which the building was put, the accessory character of the bar to that use, and the fact that it was actually physically attached to the building, we have no doubt that it was, as between the mortgagor and mortgagee, a part of the realty, and passed by the mortgage. There is nothing in the point that the parties treated it as personal property. There is no material evidence to that effect. The only thing in the least tending to prove any such thing was an act on part of defendant's cashier in the nature of an admission, made long after all these transfers, which could not affect the property rights, already fixed, of either party.

Order affirmed.

FIXTURES AS BETWEEN MORTGAGOR AND MORTGAGEE. — Whatever is placed in a building subject to a mortgage, to carry out the purpose for which it was erected, and permanently to increase its value for occupation or use, although it may be removed without injury to itself or the building, becomes part of the realty: *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519; 15 Am. St. Rep. 235. As to tests for determining what are fixtures, see note to *Lavenson v. Standard Soap Co.*, 13 Am. St. Rep. 153; note to *Roseville etc. Min. Co. v. Iowa etc. Min. Co.*, 22 Am. St. Rep. 376. See also *Hill v. Mundy*, 89 Ky. 36; *Padgett v. Cleveland*, 33 S. O. 339. Monographic notes on fixtures will be found appended to *Hunt v. Mullanphy*, 14 Am. Dec. 303; *Gray v. Holdship*, 17 Am. Dec. 686-696; and *Ottumwa Woollen Mill Co. v. Hawley*, 24 Am. Rep. 728-732.

DEWEY v. W. B. CLARK INVESTMENT COMPANY.

[48 MINNESOTA, 180.]

GUARANTY. — ONE WHO GUARANTEES THE COLLECTION OF A PROMISSORY NOTE agrees to pay the debt in case it cannot be collected out of the principal debtor by the exercise of due and reasonable diligence, and this is usually a resort to the ordinary course of the law, consisting of obtaining judgment, issuing execution, and having it returned unsatisfied.

GUARANTY OF COLLECTION OF NOTES SECURED BY MORTGAGE. — If the holder of a note secured by a mortgage sells it, guaranteeing its collection, and at the same time assigning the mortgage to the purchaser, the latter cannot maintain an action upon the guaranty until he has resorted to the mortgage, where it is conceded to be adequate security for the debt.

ACTION upon a contract of guaranty made by the defendants at the time of selling and assigning a note, which contract was as follows: "For value received, we hereby guarantee the collection of the within principal note, and of the interest notes thereto attached." Judgment in favor of the defendants; plaintiff appealed.

Fred W. Reed, for the appellant.

Cobb and Wheelwright, for the respondent.

MITCHELL, J. One Paulson executed a promissory note to one Penney, and at the same time executed to him a mortgage on certain real estate to secure its payment. Penney was the secretary of the defendant company, and although the fact does not distinctly appear, and probably is not material, we infer that the note and mortgage, although taken in the name of Penney for convenience, were in fact the property of the defendant. Subsequently, and before the maturity of the note, the defendant sold it to the plaintiff, guaranteeing its collection, and at the same time, and as part of the same transaction, sold and transferred to plaintiff the mortgage, and

caused Penney to execute to him the proper instrument of assignment. Paulson, the maker, is utterly insolvent, but the plaintiff has never resorted to the mortgage security, or attempted in any manner to collect the note out of it, although it is sufficient to pay the debt. A demurrer to an answer setting up these facts as a defense to an action brought on the guaranty presents the question whether, upon the facts stated, defendant's contract of guaranty is conditioned upon plaintiff's first resorting to and exhausting the mortgage security. The first step towards ascertaining defendant's liability is to determine the meaning of a contract guaranteeing collection. The whole law on this subject, stated generally, is, that the guarantor agrees to pay the debt in case it cannot be collected out of the principal debtor by the exercise of due or reasonable diligence. The condition of the guarantor's liability is the exercise of this degree of diligence on part of the creditor, and his inability thereby to collect the debt, and the corresponding duty of the creditor is to exercise such diligence before resorting to the guaranty. Courts, in attempting to give a fixed and inflexible meaning to a term which is in its nature incapable of it, have sometimes defined "due or reasonable diligence," in such cases, as a resort to "the ordinary course of the law," which, in turn, they have defined as obtaining judgment, issuing an execution, and its return unsatisfied. An illustration of this is found in *Stone v. Rockefeller*, 29 Ohio St. 625, cited by plaintiff.

As an almost necessary result of such definitions, some courts have held, on the one hand, that due diligence requires the creditor to first prosecute an action against the principal debtor to judgment with a return *nulla bona*, although it is absolutely certain, in advance, that this will be fruitless, and on the other hand, that this is all that due diligence requires, and that the creditor is not required, also, to resort to mortgage or other collateral securities, although they may be in all respects ample and available. In view of the fact that the end to be attained is the collection of the debt, the consistency of such rulings, or why due or reasonable diligence should necessarily be limited in all cases to the prosecution of a personal action against the debtor, is not entirely apparent. But without deciding what the rule is, where the mortgage security was given by the debtor directly to the creditor, and not furnished by the guarantor, we think that, upon both principle and authority, it must be held that where

a party holding a note secured by mortgage sells the note, guaranteeing its collection, and at the same time, and as part of the same transaction, assigns the mortgage, thereby furnishing the purchaser the means of obtaining payment, in whole or in part, the plain import of the guarantor's contract is that he will pay the debt, provided, on due diligence, it cannot be collected out of the debtor or out of the mortgage. Construed in the light of the facts, this must have been the understanding of the parties. A person guaranteeing such a debt, and assigning the mortgage with it, must have contemplated a collection by means of the mortgage, and that he would not be looked to until the creditor had resorted to that, if available: *Barman v. Carhartt*, 10 Mich. 338; *Johnson v. Shepard*, 35 Mich. 115; *Borden v. Gilbert*, 13 Wis. 670; *Brainard v. Reynolds*, 86 Vt. 614. We have found no case to the contrary, except *Day v. Elmore*, 4 Wis. 190, which is silently overruled in *Borden v. Gilbert*, 13 Wis. 670. *Jones v. Ashford*, 79 N. C. 172, is really not an authority; for in that case the purchaser positively refused to take an assignment of the note and mortgage, saying that he preferred the guaranty alone, and no formal assignment of the mortgage was ever made. Cases of sureties and guaranties of payment are, of course, not in point.

Order affirmed.

GUARANTY OF COLLECTION is an undertaking by the guarantor that a debt will be paid, if proper measures to collect it are taken within a reasonable time after it becomes payable: *Craig v. Parkie*, 40 N. Y. 181; 100 Am. Dec. 469; and that the payee shall diligently prosecute the maker without success: *Jenkins v. Wilkinson*, 107 N. C. 707; 22 Am. St. Rep. 911; *Tobin Canning Co. v. Fraser*, 81 Tex. 407. It cannot be enforced until legal proceedings to collect have been instituted and proved ineffectual, although the principal may have been insolvent: *Bosman v. Akeley*, 39 Mich. 710; 33 Am. Rep. 447. *Contra*, *Brackets v. Rich*, 23 Minn. 485; 23 Am. Rep. 703. The distinction between guaranty of payment and guaranty of collection is, that the former is an absolute unconditional undertaking on the part of the guarantor that the maker will pay the note, while the latter is an undertaking to pay, if payment cannot, by reasonable diligence, be obtained from the principal debtor: *Cowles v. Peck*, 55 Conn. 251; 3 Am. St. Rep. 44, and note. In an action on a guaranty of payment, indorsed on a non-negotiable instrument, it is not necessary, in order to fix the guarantor's liability, to prove demand of payment from the principal debtor, and notice to the guarantor of non-payment, nor the use of due diligence in pursuing the principal by legal process: *Carroll County Sav. Bank v. Strother*, 28 S. C. 504, in which case there is a full review of authorities; *Hungerford v. O'Brien*, 37 Minn. 306.

WILLIS v. MABON.

[48 MINNESOTA, 140.]

CONSTITUTIONAL LIABILITY — CORPORATE LIABILITY OF STOCKHOLDER. —

Under a provision of a state constitution declaring that each stockholder in a corporation shall be liable to the amount of the stock held by him, each is liable for corporate debts, in addition to the risk of losing the amount of his stock, though he has paid therefor in full.

CONSTITUTIONAL LAW — CORPORATE LIABILITY OF STOCKHOLDER, PROVISION CONCERNING, IS SELF-EXECUTING. —

The clause in the state constitution of Minnesota declaring that each stockholder shall be liable for the debts of the corporation to the amount of the stock held by him is self-executing.

CONSTITUTIONAL LAW. — A PROVISION OF A STATE CONSTITUTION MUST BE

REGARDED AS SELF-EXECUTING, if the nature and extent of the right conferred and the liability imposed are fixed by the constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action.

STATUTORY REMEDIES. —

Every statute made against an injury, mischief, or grievance impliedly gives a remedy for it; if no remedy is expressly given, the party has an action upon the statute.

CONSTITUTIONAL LAW — REMEDIES. — IF A STATE CONSTITUTION DECLARES

THAT A LIABILITY SHALL EXIST in certain specified circumstances, an action may be maintained to enforce such liability, without there being any legislation upon the subject. Otherwise the legislature, by its inaction, might deprive the parties of rights guaranteed to them by the constitution.

CONSTITUTIONAL LAW. — SUBJECT OF AN ACT IS SUFFICIENTLY EXPRESSED

in its title when it is to amend a pre-existing act, the title of which is recited *verbatim* in the title of such amendatory act, but without mentioning the year of its enactment.

INSOLVENCY OF CORPORATION — EFFECT ON LIABILITY OF STOCKHOLDERS.

— If a corporation is adjudged to be insolvent upon the petition of its creditors, and a receiver is appointed, who administers its assets and distributes their proceeds among those creditors, who executed releases as required by statute, such releases do not affect the personal liability of the stockholders, if the statute declares that a release executed thereunder shall not operate to discharge any other party liable as surety, guarantor, or otherwise, for the same debt.

ACTION against Mabon and others, who were stockholders in the St. Paul Sanitation Company, a business corporation, to enforce their personal liability under section 10, article 3, of the constitution of Minnesota, declaring that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him." The defendants in their answer averred that the corporation was adjudged insolvent, July 17, 1889, on peti-

tion of its creditors; that a receiver was thereupon appointed, who converted its assets into money, and that plaintiff was one of the creditors who proved their claims, received dividends, and filed releases. To this answer the plaintiff demurred, and the demurrer being sustained, the defendants appealed.

James H. Foote, for the appellant.

J. C. and W. H. Michael, for the respondent.

MITCHELL, J. 1. This was an action brought by a creditor of an insolvent corporation to recover from certain of its stockholders on their individual liability for the corporate debts, under what is commonly called "the double liability clause" of the constitution, which provides that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him": Art. ten (10), sec. three (3). The principal question in the case is, whether this provision of the constitution is self-executing, or whether it requires legislation to carry it into effect. The same question is also involved in the two cases of *McKusick v. Seymour*, 48 Minn. 158, 172, submitted at a later day of the present term, and has been exhaustively argued in both cases. Some points were made by counsel in one case that were not urged in the other; but as the question is common to both cases, and as there was an understanding among counsel that all arguments presented in either should be considered in both, we shall endeavor to fully determine the question in the present opinion. In addition to this main question, counsel for the appellants in the first case, *infra*, urged that this constitutional provision is not intended to impose any "double liability" upon stockholders, but simply means that they shall be bound to pay for their stock once its "face amount," any device or agreement to the contrary notwithstanding, and that, having once paid for their stock in full, they are not further liable. Except for the eminence of the counsel who have advanced this view, we would not deem it entitled to serious consideration. While no fixed form of words has been adopted to express the idea, yet provisions couched in more or less similar language have been frequently incorporated into constitutions and statutes, and have been uniformly understood and construed as providing for an individual liability of stockholders for corporate debts, in addition to this risk of losing the amount of their stock.

This is the meaning which has been invariably attached to this provision of our constitution. It is the one attributed to it by this court in numerous cases, although never in the form of a direct and authoritative decision; and we do not believe that the construction now sought to be placed upon it ever occurred to, or was ever advanced by, any one, until suggested by counsel in the present case. Any such construction would render the provision meaningless and useless, for all that would be accomplished by it was already fully covered by the law. If a person had subscribed for stock, and had not paid for it the amount agreed, of course he was liable to the corporation, and, through it, to its creditors; and if the stock had been issued to him as paid-up stock, when not in fact paid for, under such circumstances as to operate as a fraud upon creditors, he was, upon well-settled principles, liable to them as for unpaid stock subscriptions. The construction contended for would give the public no security beyond what they already had under the existing law. Its absurdity is rendered apparent when considered in connection with the amendment of November 5, 1872, inclosed in parentheses; for then the whole section would mean, that while the stockholders in all other corporations should be liable to pay once for their stock at its face amount, yet stockholders in manufacturing corporations need not be required to do so. The obvious intention of the provision was to add to the ordinary liability of a corporation for its debts the individual liability of the stockholders, to a limited amount, and that the measure of that liability should be a sum equal to the amount of stock owned or held by them. This stock is not the subject of the liability, but the measure of it; in other words, the stockholders are liable, not for the stock, but, in addition thereto, for a sum measured by the amount of the stock.

2. This brings us to the main question, viz., whether this provision of the constitution is self-executing. That such has been the general understanding of the bench, bar, and business men in this state is conceded. This court has, in a long line of cases, assumed that such was the fact: *Dodge v. Minnesota Plastic Slate Roofing Co.*, 16 Minn. 368; *Allen v. Walsh*, 25 Minn. 543; *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213; *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343; *Arthur v. Willis*, 44 Minn. 409; *Densmore v. Shepard*, 46 Minn. 54. And, so far as we are aware, the correctness of this view has

never been questioned or doubted in any court, until one of the counsel in this case interposed a brief in *Arthur v. Willis*, 44 Minn. 409, in which he took the position for which he now contends. Of course it is true, as counsel suggests, that this court has never before been called on to decide the question, and that mere assumption on the part of either bench or bar does not make a thing law; but, on the other hand, it is also true that a construction which has for a third of a century been accepted by every one as so obviously correct as never to have been questioned or doubted is much more likely to be right than a newly discovered one, suggested at this late day by the emergencies of present litigation. The fact that no such view ever before suggested itself to the minds of court or counsel in the numerous cases where the point might have been made, and where it was to the interest of counsel on one side or the other to make it, certainly raises a strong presumption against it. Moreover, as the generally accepted view has doubtless long been the basis of the credit of corporations, it ought not now to be disturbed, unless clearly wrong. But if the question was entirely one of first impression, we have no doubt as to how it should be determined. A constitution is but a higher form of statutory law, and it is entirely competent for the people, if they so desire, to incorporate into it self-executing enactments. These are much more common than formerly, the object being to put it beyond the power of the legislature to render them nugatory by refusing to enact legislation to carry them into effect. Prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void. But instances of affirmative self-executing provisions are numerous in almost every modern constitution. For instances of this, see *State v. Weston*, 4 Neb. 216; *Thomas v. Owens*, 4 Md. 189; *Reynolds v. Taylor*, 43 Ala. 420; *Miller v. Marx*, 55 Ala. 322; *People v. Hoge*, 55 Cal. 612.

Without stopping to specify, it will be found, on examination, that our own constitution abounds in provisions that are unquestionably self-executing, and require no legislation to put them into operation. The question in every case is, whether the language of a constitutional provision is addressed to the courts or the legislature, — does it indicate that it was intended as a present enactment, complete in itself as definitive legislation? or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a con-

sideration, both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts. In almost every case cited by appellants in which a constitutional provision has been held not self-executing, it will be found either that its language indicated an intention that legislation should be had to carry it into effect, or that the nature of the provision itself was such as to render such legislation necessary.

To the first class may be referred the provision in the constitution of Missouri (quite different from that in ours) considered in the case of *Morley v. Thayer*, 3 Fed. Rep. 737, although that case really only decided that the plaintiff could not recover, because he had not followed the remedy provided by statute. To the same class belongs the case of *Jerman v. Benton*, 79 Mo. 148, although it seems to have been assumed, without argument or consideration, that the constitutional provision there considered required legislation to carry it into effect. To the second class belongs *Bowie v. Lott*, 24 La. Ann. 214, in which it was held that a constitutional provision that "all lands sold in pursuance of decrees of courts shall be divided into tracts of from ten to fifty acres" required legislation to carry it into effect. This is plain from the very nature of the provision. It furnishes no *modus operandi*, and does not provide how or by whom the land was to be divided, nor determine the exact size of the tracts. It was evidently a mere general direction to the legislature. To the same class may be referred the case of *Missouri etc. R'y Co. v. Texas etc. R'y Co.*, 10 Fed. Rep. 497, involving a provision in the constitution of Texas that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," although all that was decided in that case was that the defendant railway company could not, on its own motion, make the crossing without the consent of the defendant, or without resort to legal proceedings in which the conditions and limitations under which such right should be exercised should be judicially fixed and determined. *Groves v. Slaughter*, 15 Pet. 449, 499, cited by appellant, perhaps goes fur-

ther than any other case in holding a constitutional provision not self-executing; but its weight as an authority is much weakened from the facts that it was not considered by a full bench, and was decided by a divided court, Justice Story being one of the dissenters. Moreover, it seems difficult to reconcile the decision in that case with the rule that prohibitory constitutional provisions are self-executing to the extent that anything done in violation of them is void; or the further rule, which that court has always professed to follow, that it would adopt the construction given to the constitution and laws of a state, not conflicting with those of the Union, by the highest court of that state.

Of all the cases cited by appellant, the one most relied on is that of *French v. Teschemacher*, 24 Cal. 518. The constitution of California provided: "Sec. 32. Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law." "Sec. 36. Each stockholder of a corporation or joint-stock association shall be individually and personally liable for his proportion of all its debts and liabilities." The court held that section thirty-six (36) was not self-executing. But the decision was mainly based upon two considerations. The first was, that while this section provided that each stockholder should be liable for his proportion of the corporate debts, yet it did not determine what that proportion should be, nor prescribe any rule by which it should be ascertained. The second was, that section thirty-six (36) was to be read in connection with section thirty-two (32), which was evidently addressed to the legislature. No such considerations exist here, and hence we do not think that the case is in point. The language used in our constitution is positive and mandatory. There is nothing in it indicative of an intention that ancillary legislation should be had to carry it into effect; neither is there anything in the nature of the liability imposed, such as to render any such legislation necessary. It is in the form of a present, complete enactment, which, although elliptical in form, definitely fixes the nature and amount of the liability, and to whom the liability is incurred. As remarked in *Allen v. Walsh*, 25 Minn. 543, "it declares the creation of a liability to the extent named in the cases referred to." It is true that a question might arise as to whether it is the person who holds the stock when a debt is contracted, or the one who holds it when the action is brought,

or any one who held it at any time while the debt existed, that is liable. But this is a mere question of construction, which would exist if the same or similar language were used in a statute, as has sometimes been the case. But questions of construction, whether of a constitution or a statute, are for the courts, and not for the legislature. In fact, all the criticisms of the appellant upon this article of the constitution refer merely to supposed obscurities in its meaning, or doubts as to its construction; and the logic of his argument is, that it is for the legislature to construe it, and determine its true meaning. According to his view, it means anything or nothing, according as the legislature see fit to construe it. But the people meant something by this provision, and when that meaning is judicially determined by legitimate rules of construction, it is as obligatory on the legislature as on any one else.

Much stress is laid upon the fact that this provision contains no remedy for enforcing the liability, as indicating that it was not intended to be self-executing. We fail to perceive any force whatever in this line of argument. The maxim, *Ubi jus ibi remedium*, is as old as the law itself. As was said by Lord Holt, "If a man has a right, he must have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise and enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." The maxim referred to gave occasion for the invention of that form of action called "an action on the case." The principle adopted by the courts accordingly was, that the novelty of the particular complaint in an action on the case was no objection, provided an injury cognizable by law be shown to have been inflicted on the plaintiff. Every statute made against an injury, mischief, or grievance impliedly gives a remedy; for if no remedy be expressly given, a party has his action upon the statute. For example, "if a penalty be given by statute, but no action for the recovery thereof be named, an action of debt for the penalty will lie": 2 Dwarries on Statutes, 677. So where a statute requires an act to be done for the benefit of another, or forbids the doing of an act which may be to his injury, though no action be given in express terms by the statute for the omission or commission, the general rule of law is, that the party injured shall have an action; for where a statute gives a right, there, although in express terms it has not given a

remedy, the remedy which by law is properly applicable to that right follows as an incident: *Ashby v. White*, 2 Ld. Raym. 938. Hence, in the present case, it was not necessary that the constitution should have expressly given a remedy by which a creditor of the corporation might enforce the liability of a stockholder. If it in fact created such a liability of the latter in favor of the former, there would not be the least trouble in framing a proper complaint in an action to enforce it. Of course, the remedy is always within the control of the legislature, and may be changed as they see it, provided only it remains adequate. It is entirely competent for them to provide a new and statutory remedy, and make it exclusive, if they see fit. An inference in favor of appellant's contention is sought to be drawn from the history of this provision in the constitutional convention. In the form in which it is now found, this provision was the one adopted by the Democratic wing of the convention. The provision first adopted was, that "provision shall be made making each stockholder individually liable to the amount of stock held or owned by him." Counsel say, and doubtless correctly, that this would not have been self-executing, as its language was directed to the legislature, and evidently contemplated legislation to carry it into effect. In this form it was adopted by the committee of the whole, and then referred to the committee on phraseology and revision, who reported it back in its present form ("every stockholder shall be liable," etc.), when it was adopted by the convention. To our minds, the material change which that committee made in the language indicates very strongly that the purpose of the change was to put the provision in the form of a self-executing enactment, and thus place it beyond the power of the legislature to defeat the object sought to be accomplished.

An argument is also sought to be drawn from subsequent legislative construction. We attach little or no importance to this. An argument either way might be made, for the legislation upon the subject of the individual liability of stockholders has been variable, and not uniformly consistent either with the theory that the constitution itself created such a liability, or that it did not. Upon the theory that it did, it must be confessed that some of this legislation was superfluous and its repeal unavailing. On the other hand, it may be said that, in passing Laws 1878, chapter 56, making stockholders in manufacturing or mechanical corporations liable for cor-

porate debts to the amount of stock held or owned by them, the legislature must have assumed that the constitution itself created such a liability in the case of other corporations, for it is not to be supposed that they would have singled out manufacturing corporations as the only ones where such a liability should exist. Moreover, the legislature in submitting, and the people in adopting, the amendment of 1872 excepting corporations organized for a manufacturing or mechanical business from the operation of article ten (10), section three (3), of the constitution must have supposed that this section *ex propria vigore* created an individual liability on the part of stockholders, for otherwise the amendment was useless and unnecessary, unless it was to relieve the legislature from a sort of moral obligation to legislate on the subject.

8. The answer in this case alleges that in July, 1889, the defendant corporation was, upon petition of creditors under the insolvent law of 1881, adjudged insolvent, and a receiver of its property appointed by the court, who had fully administered the corporate assets, and distributed the proceeds among those creditors who executed releases to the corporation as required by statute; that plaintiff, in January, 1890, executed and filed such a release, and accepted her dividend from the receiver. It is claimed, under the doctrine of *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343, that this release of the corporation had the effect of also releasing the stockholders. The plaintiff, on the other hand, claims that the rule of that case was changed by Laws 1889, chapter 30, entitled "An act to amend an act entitled 'An act to prevent debtors from giving preference to creditors, and to secure the equal distribution of the property of debtors among their creditors, and for the release of debts against debtors'"; section one (1) of the amendatory act providing "that the release of any debtor under this act shall not operate to discharge any other party liable as surety, guarantor, or otherwise for the same debt." The point is made that this amendatory act is invalid, because the subject is not sufficiently expressed in its title. There is nothing in this. It recites *verbatim* the title of the original act, which sufficiently expresses the subject of that act. It is true that the title of the amendatory act does not refer to the chapter, or year when the original act was passed, but this is unimportant, especially as there was no other act of the same title. Similar titles have been invariably sustained in this and other jurisdictions having the same con-

stitutional provision. The title of this act is not materially different from that sustained by this court in *City of Winona v. School Dist.*, 40 Minn. 13; 12 Am. St. Rep. 687.

It is further claimed that the amendment is inapplicable, because its terms will not include the liability of stockholders for corporate debts; the argument being, that where words of specific import are followed by a general term, the general term is to be taken to apply only to persons or things *ejusdem generis* with the specific terms; that the words "or otherwise" must therefore be limited to those whose liability for the debt is of the same kind as that of surety or guarantor; and that the liability of a stockholder for the debts of a corporation is different from that of either a surety or a guarantor, and therefore not within the terms of the act. The act of 1889 was passed about two weeks after the decision of the Mohr case, and the proviso referred to was doubtless enacted for the very purpose of changing the rule laid down in that case. That it had that effect was assumed in *Tripp v. Northwestern Nat. Bank*, 41 Minn. 400, decided Aug. 12, 1889. Even under the strict doctrine of *ejusdem generis*, we have no doubt that the term "or otherwise" would embrace those liable as stockholders for corporate debts; for while that liability is *sui generis*, yet it is in many respects sufficiently analogous to that of surety or guarantor to fall within the same general class. But the doctrine of *ejusdem generis* is but a rule of construction to aid in ascertaining the meaning of the legislature, and does not warrant a court in confining the operation of a statute within narrower limits than intended by the law-makers. The general object of an act sometimes requires that the final general term shall not be restricted in meaning by its more specific predecessors. Thus the expression, "any bond or other specialty," has been held to comprehend every kind of specialty, including a statute. The evident intention was, that this amendment should embrace all cases where some one else was liable, in whatever capacity, for the same debt with the insolvent debtor. The insolvency proceedings against the corporation were instituted and its discharge granted after the passage of the act of 1889, but the debt for which plaintiff sues was contracted prior to that date; and it is claimed that the act is, as to stockholders whose liability had been already incurred, unconstitutional, because impairing the obligation of contracts. We confess our inability to appreciate the force of this argument. The liability of a stockholder is fixed and

measured by the constitution alone. The insolvent law neither increases nor affects that liability, but has reference solely to the remedy of the creditor against the insolvent debtor. An existing creditor would have as much right to object to the passage of a bankrupt act, or a debtor to its subsequent repeal, as would this appellant to object to the amendment of this insolvent law. Bankrupt laws, either by express provision or by construction, generally provide that the discharge of the bankrupt shall not release another person who is liable for the same debt. This has been held indiscriminately in cases where the debt was contracted before, as well as where it was contracted after, the passage of the bankrupt act, and it was never suggested that as to such other person the act was invalid, as impairing the obligation of his contract. The discharge of the insolvent or bankrupt in such cases, as we have repeatedly held, is not the voluntary act of the creditor, but purely by operation of law, which, like the act of God, hurts nobody.

Order affirmed.

THIS CASE was followed in *McKusick v. Seymour*, 48 Minn. 158, in which, in addition to determining that section 3 of article 10 of the state constitution was self-executing, the court further determined that the liability of stockholders for corporate debts might be enforced under a sequestration proceeding against a corporation under chapter 76 of the General Statutes of Minnesota, edition of 1878, and upon the application of any creditor who is a party to the proceeding.

CORPORATIONS — INDIVIDUAL LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS. — The extent of this liability, and the degree to which constitutional provisions relating thereto are self-executing, are discussed in the extended note to *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 837, and following pages. In Illinois, stockholders are partners, and liable as such to the creditors of the corporation to an amount equal to the amount of stock held by them; *Schalucky v. Field*, 124 Ill. 617; 7 Am. St. Rep. 399. Under a similar statute in Florida, it is held that the liability of a stockholder is one arising *ex contractu*, being assumed by the act of subscribing for stock, and that a creditor can enforce the liability without resort to a court of equity, and without either joining other creditors in the action as plaintiffs, or joining all the stockholders as defendants: *Gibbs v. Davis*, 27 Fla. 531.

STATUTES — AMENDMENT BY REFERENCE TO TITLE. — Several cases relating to the validity of statutes amending former ones by reference to their titles will be found in the note to *Winona v. School District*, 12 Am. St. Rep. 696. When the legislature resorts to amendatory legislation, it must be made to conform to the express requirements of the constitution in this respect, although the same effect might be produced by enactments not amendatory, but independent: *State v. Common Council*, 53 N. J. L. 566. Under a constitutional provision that "no law shall be revived or amended by reference to its title only, but the act revived or the section or sections amended

shall be inserted at length," the repeal, by reference to its title only, of an act repealing a prior act will not revive the former act: *Wallace v. Bradshaw*, 53 N. J. L. 315.

SUSPENSION OF THE REMEDY AGAINST THE CORPORATION does not suspend or affect the liability of the stockholders, each stockholder being liable as principal debtor, not as surety, for his proportion of the corporate debts contracted while he was a stockholder: *Hysman v. Coleman*, 82 Cal. 680; 16 Am. St. Rep. 178.

HOSPES v. NORTHWESTERN MANUFACTURING Co.

[48 MINNESOTA, 174.]

CORPORATE LIABILITY OF STOCKHOLDERS, WHO MAY ENFORCE. — The individual liability of stockholders for corporate debts may be enforced in a sequestration proceeding against the corporation, under chapter 76 of the General Statutes of Minnesota, upon the application of any creditor who is a party to the proceeding.

CORPORATION. — **THE PROPERTY OF A CORPORATION IS A TRUST FUND** for the payment of its debts, in the sense that when it is lawfully dissolved all its creditors are entitled in equity to have their debts paid out of such property before any distribution thereof is made among the stockholders, and also in the sense that any conveyance of the property of the corporation, without authority of law and in fraud of existing creditors, is void as against them.

CORPORATION. — **UNPAID SUBSCRIPTION FOR STOCK DOES NOT CONSTITUTE A TRUST FUND** for the payment of creditors of the corporation to any greater extent than any other of its assets, and whether the issuing of stock without exacting payment therefor constitutes a fraud upon creditors is to be determined upon the same principle as if the controversy related to some other assets of the corporation.

CORPORATIONS. — **UNPAID SUBSCRIPTION FOR STOCK CANNOT BE RECOVERED** by creditors of the corporation when the corporation itself never had any such right. Hence if stock is issued by a corporation upon a contract that it shall not be paid for, its creditors cannot recover payment for such stock on account of the implied promise of the persons receiving it that such payment will be made. If the creditors have rights of action in such a case superior to those of the corporation, they must be based upon tort or fraud, actual or implied.

CORPORATION. — **STATUTE FORBIDDING THE ISSUING OF STOCK WHICH IS NOT PAID FOR** does not create an implied contract that one who receives *bonus* stock without payment will pay therefor, though it may make such issue void and *ultra vires*.

CORPORATION. — **IN THE CASE OF THE ISSUE OF BONUS STOCK, AN EQUITY** does not lie, in favor of all the creditors of the corporation, entitling them to compel payment therefor. Such an equity does not exist in favor of a creditor whose demand accrued prior to such issue, nor in favor of a creditor whose demand was thereafter contracted with full knowledge of the arrangement by which the *bonus* stock was issued, for one cannot be defrauded by that which he knows when he acted.

CORPORATION — BONUS STOCK. — **PERSONS DEALING WITH A CORPORATION, IN THE ABSENCE OF KNOWLEDGE TO THE CONTRARY,** have the right to

assume that it has a paid-in capital to the amount which it represents itself as having, and if they give credit on the faith of that representation, and the corporation becomes insolvent, one who has received bonus stock without making payment therefor may be compelled to make such payment, but it is only those creditors who may be fairly presumed to have relied upon the apparent amount of capital in whose favor the law will recognize and enforce an equity against the holders of bonus stock.

CORPORATION — BONUS STOCK. — A CREDITOR WHO SEEKS TO COMPEL PAYMENT FOR BONUS STOCK need not allege that he believed such stock to have been paid for when he became such creditor, and that he relied upon the apparent capital of the corporation. If he had knowledge of the arrangement under which the stock was issued, that must be pleaded as a matter of defense.

CORPORATION — BONUS STOCK — PLEADING. — ASSIGNEE SEEKING TO COMPEL THE HOLDERS OF BONUS STOCK to make payment therefor, and whose claims were acquired after the corporation became insolvent, should state what he paid for such claims, or, at least, aver that he paid some substantial consideration. If he bought up the claims for a mere song, for the purpose of speculating on the liability of stockholders, no court would grant him relief.

CORPORATIONS — BONUS STOCK. — STATUTE OF LIMITATIONS in a suit by creditors of an insolvent corporation to compel holders of bonus stock to make payment therefor does not commence to run prior to the insolvency of the corporation.

DECEASED PERSONS — CONTINGENT CLAIMS. — A suit by a creditor of an insolvent corporation to compel payment for bonus stock issued to a decedent is based upon a contingent claim within the meaning of a statute permitting claims to be prosecuted against a decedent after the expiration of the usual time for their presentation, when such claims are contingent.

PROCEEDING by Hospes and Wurdeman, praying that the property of the Northwestern Manufacturing and Car Company be sequestered and a receiver thereof appointed. Such receiver was appointed and given possession of the property. Thereafter, on September 9, 1884, an order was made, requiring the creditors of the corporation to exhibit their claims within six months and become parties to the proceeding. The Minnesota Thresher Company, a corporation, acting under the order last named, presented a claim against the insolvent corporation, and by leave of the court filed a supplemental complaint therein on behalf of itself and other creditors of the insolvent, and against one hundred and more persons, holders of the common stock of the insolvent corporation, to compel them to pay to the receiver the face value of such stock, on the ground that it had been issued to them without any payment whatever therefor. A demurrer interposed to this supplemental complaint was overruled, and thereupon the

defendant appealed to the supreme court. One of these defendants was the executor of Norman W. Kittson, who died in May, 1888, and it was contended that the claim against him should have been presented to and approved before the probate court of the county in which he had his domicile, and that for want of such proof and presentation, the claim could not be enforced in this proceeding.

Lusk, Bunn, and Hadley, Warner, Richardson, and Lawrence, Searles and Gail, Horace G. Stone, and Harvey Officer, for the appellants.

Flandrau, Squires, and Cutcheon, and Davis, Kellogg, and Severance, for the respondent.

MITCHELL, J. This appeal is from an order overruling a demurrer to the so-called "supplemental complaint" of the Minnesota Thresher Manufacturing Company. The Northwestern Manufacturing and Car Company was a manufacturing corporation organized in May, 1882. Upon the complaint of a judgment creditor (*Hospes & Co.*), after return of execution unsatisfied, judgment was rendered in May, 1884, sequestering all its property, things in action, and effects, and appointing a receiver of the same. This receivership still continues, the affairs of the corporation being not yet fully administered; but it appears that it is hopelessly insolvent, and that all the assets that have come into the hands of the receiver will not be sufficient to pay any considerable part of the debts. The Minnesota Thresher Manufacturing Company, a corporation organized in November, 1884, as creditor, became a party to the sequestration proceeding, and proved its claims against the insolvent corporation. In October, 1889, in behalf of itself and all other creditors who have exhibited their claims, it filed this complaint against certain stockholders (these appellants) of the car company, in pursuance of an order of court allowing it to do so, and requiring those thus impleaded to appear and answer the complaint. The object is to recover from these stockholders the amount of certain stock held by them, but alleged never to have been paid for. What was said in *McKusick v. Seymour*, 48 Minn. 158, is equally applicable here as to the right to enforce such a liability in the sequestration proceeding upon the petition or complaint of creditors who have become parties to it. There is nothing in this practice inconsistent with what was decided in *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37. The

complaint is not the commencement of an independent action by creditors in their own behalf, antagonistic to the rights of the receiver, but is filed in the sequestration proceeding itself, and in aid of it.

The principal question in the case is, whether the complaint states facts showing that the thrasher company, as creditor, is entitled to the relief prayed for; or in other words, states a cause of action. Briefly stated, the allegations of the complaint are, that on May 10, 1882, Seymour, Sabin, & Co. owned property of the value of several million dollars, and a business then supposed to be profitable; that in order to continue and enlarge this business, the parties interested in Seymour, Sabin, & Co., with others, organized the car company, to which was sold the greater part of the assets of Seymour, Sabin, & Co. at a valuation of two million two hundred and sixty-seven thousand dollars in payment of which there were issued to Seymour, Sabin, & Co. shares of the preferred stock of the car company of the par value of two million two hundred and sixty-seven thousand dollars, it being then and there agreed by both parties that this stock was in full payment of the property thus purchased. It is further alleged that the stockholders of Seymour, Sabin, & Co., and the other persons who had agreed to become stockholders in the car company, were then desirous of issuing to themselves, and obtaining for their own benefit, a large amount of common stock of the car company, "without paying therefor, and without incurring any liability thereon or to pay therefor"; and for that purpose, and "in order to evade and set at naught the laws of this state," they caused Seymour, Sabin, & Co. to subscribe for and agree to take common stock of the car company of the par value of one million five hundred thousand dollars; that Seymour, Sabin, & Co. thereupon subscribed for that amount of the common stock, but never paid therefor any consideration whatever, either in money or property; that thereafter these persons caused this stock to be issued to D. M. Sabin, as trustee, to be by him distributed among them; that it was so distributed, without receipt by him or the car company, from any one, of any consideration whatever, but was given by the car company and received by these parties entirely "gratuitously." The car company was, at this time, free from debt, but afterwards became indebted to various persons for about three million dollars. The thrasher company, incorporated after the insolvency and receivership of the car company, for

the purpose of securing possession of its assets, property, and business, and therewith engaging in and continuing the same kind of manufacturing, prior to October 27, 1887, purchased and became the owner of unsecured claims against the car company, "*bona fide*, and for a valuable consideration," to the aggregate amount of one million seven hundred and three thousand dollars. As creditor, standing on the purchase of these debts, which were contracted after the issue of this *bonus* stock, the thrasher company files this complaint to recover the par value of the stock, as never having been paid for.

The complaint does not allege what the consideration of these debts was, nor to whom originally owing, nor what the intervener paid for them, nor whether any of the original creditors trusted the car company on the faith of the *bonus* stock having been paid for. Neither does it allege that either the thrasher company or its assignors were ignorant of the *bonus* issue of stock, nor that they, or any of them, were deceived or damaged in fact by such issue, nor that the *bonus* stock was of any value. Neither is there any traversable allegation of any actual fraud or intent to deceive or injure creditors. A desire to get something without paying for it, and actually getting it, is not fraudulent or unlawful, if the donor consents, and no one else is injured by it; and the general allegation that it was done "in order to evade and set at naught the laws of the state" of itself amounts to nothing but a mere conclusion of law. As a creditor's bill, in the ordinary sense, the complaint is manifestly insufficient. The thrasher company, however, plants itself upon the so-called "trust-fund" doctrine, that the capital stock of a corporation is a trust fund for the payment of its debts; its contention being that such a "*bonus*" issue of stock creates, in case of the subsequent insolvency of the corporation, a liability on part of the stockholder in favor of creditors to pay for it, notwithstanding his contract with the corporation to the contrary.

This "trust-fund" doctrine, commonly called the "American doctrine," has given rise to much confusion of ideas as to its real meaning, and much conflict of decision in its application. To such an extent has this been the case that many have questioned the accuracy of the phrase, as well as doubted the necessity or expediency of inventing any such doctrine. While a convenient phrase to express a certain general idea, it is not sufficiently precise or accurate to constitute a safe

foundation upon which to build a system of legal rules. The doctrine was invented by Justice Story in *Wood v. Dummer*, 3 Mason, 308, which called for no such invention, the fact in that case being that a bank divided up two thirds of its capital among its stockholders without providing funds sufficient to pay its outstanding bill-holders. Upon old and familiar principles, this was a fraud on creditors. Evidently all that the eminent jurist meant by the doctrine was that corporate property must be first appropriated to the payment of the debts of the company before there can be any distribution of it among stockholders, — a proposition that is sound, upon the plainest principles of common honesty. In *Fogg v. Blair*, 133 U. S. 534, 541, it is said that this is all the doctrine means. The expression used in *Wood v. Dummer*, 3 Mason, 308, has, however, been taken up as a new discovery, which furnished a solution of every question on the subject. The phrase that "the capital of a corporation constitutes a trust fund for the benefit of creditors" is misleading. Corporate property is not held in trust, in any proper sense of the term. A trust implies two estates or interests, — one equitable and one legal; one person, as trustee, holding the legal title, while another, as the *cestui que trust*, has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further.

This is well illustrated and clearly announced in the case of *Graham v. La Crosse etc. R. R. Co.*, 102 U. S. 148. That was a creditor's suit to reach a piece of real estate on the ground that it had been conveyed by the corporation fraudulently for a wholly inadequate consideration. The trust-fund doctrine was invoked by a subsequent creditor, and it was claimed that as the trust had been violated, the deed should be set aside. If the premise was correct that the corporation held it in trust for creditors, the conclusion was inevitable; but the court denied the premise, saying that a corporation is, in law, as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same; and that there

is no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors, any more than a like disposal by an individual; that the same principles of law apply to each. That the phrase that "the capital of a corporation is a trust fund for the payment of its creditors" is misleading, if not inaccurate, is illustrated by the character of the actions that are frequently mistakenly instituted on the strength of it. For example, in the case of *Wabash etc. R'y Co. v. Ham*, 114 U. S. 587, two roads had been consolidated, the new company acquiring the property of the old ones. A creditor of one of the old companies, on the strength of the "trust-fund" doctrine, claimed a lien on its property in the hands of the new corporation. If this property was impressed with a trust in favor of creditors in the hands of the old company, it would logically follow that it would continue so in the hands of the new one. But the court denied the relief, and in giving its construction of the "trust-fund" doctrine, said: "The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that, when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of the property of the debtor, without authority of law, and in fraud of existing creditors, is void." This is probably what is meant when it is said in some cases, as in *Clark v. Bever*, 139 U. S. 96, 110, that the capital of a corporation is a trust fund *sub modo*. If so, no one will dispute it. But it means very little, for the same thing could be truthfully said of the property of an individual or a partnership. And obviously it would make no difference whether the disposition of the corporate property is to a stranger or to a stockholder, except that, of course, the latter could not be an innocent purchaser.

There is also much confusion in regard to what the "trust-fund" doctrine applies. Some cases seem to hold that unpaid subscribed capital is a trust fund, while other assets are not, — that is, so long as the subscription is unpaid, it is held in trust by the corporation, but when once paid in, it ceases to be a trust fund, while other cases hold that, paid or unpaid, it is all a trust fund. The first seems to be the rule laid down in *Sawyer v. Hoag*, 17 Wall. 610, in which the "trust-fund"

doctrine was first squarely announced by that court with all the vigor and force characteristic of the great jurist who wrote the opinion. In that case, a stockholder in an insurance company had given his note, as the court found the fact to be, for eighty-five per cent of his subscription to the stock of the company. After the company had become bankrupt, and the stockholder knew the fact, he bought up a claim against the company for one third its face, and in a suit by the assignee in bankruptcy on his note set up this claim as an offset. That this would have been a fraud on the bankrupt act, and at least a moral fraud on policy-holders, is quite apparent, without invoking the "trust-fund" doctrine; and if the note for unpaid stock was a trust fund, there could have been no offset, whether the company was solvent or insolvent. In the opinion, it is said that if the subscription had been paid by the note or otherwise, the note ceased thereby to be a trust fund to which creditors can look, and becomes ordinary assets, with which directors may deal as they choose. But in *Upton v. Tribilcock*, 91 U. S. 45, it is stated: "The capital paid in and promised to be paid in is a fund which the trustees cannot squander or give away." While in *Sanger v. Upton*, 91 U. S. 56, it is said: "When debts are incurred, a contract arises with the creditors that it [the capital] shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied." And in the same connection, it is distinctly stated that there is no difference between assets paid in and subscriptions; that "unpaid stock is as much a part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation." This language is quoted and approved in *County of Morgan v. Allen*, 103 U. S. 498, 508. It would seem clear that this is the correct statement of the law. The capital (not the mere share certificates) means all the assets, however invested. If a subscriber gives his note for his stock, that note is no more and no less a trust fund than the money would have been if he had paid cash down. Capital cannot change from a trust to not a trust by a mere change of form. It is either all a trust or all not a trust, and

the "trust-fund" rule, whatever that be, must apply to all alike, and in the same way. If the assets of a corporation are given back to stockholders, the result is the same as if the shares had been issued wholly or partly as a *bonus*. The latter is merely a short cut to the same result. So with dividends paid out of the capital, voluntary conveyances, stock paid in overvalued property; all are forms of one and the same thing, all reaching the same result (a disposition of corporate assets), which may or may not be a fraud on creditors, depending on circumstances. This much being once settled, the solution of the question, when a subsequent creditor can insist on payment of stock issued as paid up, but not in fact paid for, or not paid for at par, becomes, as we shall presently see, comparatively simple.

Another proposition which we think must be sound is, that creditors cannot recover on the ground of contract when the corporation could not. Their right to recover in such cases must rest on the ground that the acts of the stockholders with reference to the corporate capital constitutes a fraud on their rights. We have here a case where the contract between the corporation and the takers of the shares was specific that the shares should not be paid for. Therefore, unlike many of the cases cited, there is no ground for implying a promise to pay for them. The parties have explicitly agreed that there shall be no such implication, by agreeing that the stock shall not be paid for. In such a case the creditors undoubtedly may have rights superior to the corporation, but these rights cannot rest on the implication that the shareholder agreed to do something directly contrary to his real agreement, but must be based on tort or fraud, actual or presumed. In England, since the act of 1867, there is an implied contract created by statute that "every share in any company shall be deemed and be taken to have been issued and to be held subject to the payment of the whole amount thereof in cash." This statutory contract makes every contrary contract void. Such a statute would be entirely just to all, for every one would be advised of its provisions, and could conduct himself accordingly. And in view of the fact that "watered" and "*bonus*" stock is one of the greatest abuses connected with the management of modern corporations, such a law might, on grounds of public policy, be very desirable. But this is a matter for the legislature, and not for the courts. We have no such statute; and even if the law of 1873, under which the

car company was organized, impliedly forbids the issue of stock not paid for, the result might be, that such issue would be void as *ultra vires*, and might be canceled, but such a prohibition would not of itself be sufficient to create an implied contract, contrary to the actual one, that the holder should pay for his stock.

It is well settled that an equity in favor of a creditor does not arise absolutely and in every case to have the holder of "bonus" stock pay for it contrary to his actual contract with the corporation. Thus no such equity exists in favor of one whose debt was contracted prior to the issue, since he could not have trusted the company upon the faith of such stock: *First Nat. Bank v. Gustin etc. Mining Co.*, 42 Minn. 327; 18 Am. St. Rep. 510; *Coit v. Gold Amalgamating Co.*, 119 U. S. 343; *Handley v. Stutz*, 139 U. S. 417, 435. It does not exist in favor of a subsequent creditor who has dealt with the corporation with full knowledge of the arrangement by which the "bonus" stock was issued; for a man cannot be defrauded by that which he knows when he acts: *First Nat. Bank v. Gustin etc. Mining Co.*, 42 Minn. 327; 18 Am. St. Rep. 510. It has also been held not to exist where stock has been issued and turned out at its full market value to pay corporate debts: *Clark v. Bever*, 139 U. S. 96. The same has been held to be the case where an active corporation, whose original capital has been impaired, for the purpose of recuperating itself, issues new stock, and sells it on the market for the best price obtainable, but for less than par: *Handley v. Stutz*, 139 U. S. 417; although it is difficult to perceive, in the absence of a statute authorizing such a thing (of which every one dealing with the corporations is bound to take notice), any difference between the original stock of a new corporation, and additional stock issued by a "going concern."

It is difficult, if not impossible, to explain or reconcile these cases upon the "trust-fund" doctrine, or, in the light of them, to predicate the liability of the stockholder upon that doctrine. But by putting it upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They

have a right to assume that it has paid-in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, "Make that representation good by paying for your stock." It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases; and it follows that it is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of "*bonus*" stock. This furnishes a rational and uniform rule, to which familiar principles are easily applied, and which frees the subject from many of the difficulties and apparent inconsistencies into which the "trust-fund" doctrine has involved it; and we think that even when the trust-fund doctrine has been invoked, the decision in almost every well-considered case is readily referable to such a rule.

It is urged, however, that if fraud be the basis of the stockholders' liability in such cases, the creditor should affirmatively allege that he believed that the *bonus* stock had been paid for, and represented so much actual capital, and that he gave credit to the corporation on the faith of it; and it is also argued that while there may be a presumption to that effect in the case of a subsequent creditor, this is a mere presumption of fact, and that in pleadings no presumptions of fact are indulged in. This position is very plausible, and at first sight would seem to have much force; but we think it is unsound. Certainly, any such rule of pleading or proof would work very inequitably in practice. Inasmuch as the capital of a corporation is the basis of its credit, its financial standing and reputation in the community has its source in, and is founded upon, the amount of its professed and supposed capital, and every one who deals with it does so upon the faith of that standing and reputation, although, as a matter of fact, he may have no personal knowledge of the amount of its professed capital, and in a majority of cases knows nothing about the shares of stock held by any particular stockholder, or if

so, what was paid for them. Hence, in a suit by such creditor against the holders of "bonus" stock, he could not truthfully allege, and could not affirmatively prove, that he believed that the defendants' stock had been paid for, and that he gave the corporation credit on the faith of it, although, as a matter of fact, he actually gave the credit on the faith of the financial standing of the corporation, which was based upon its apparent and professed amount of capital. The misrepresentation as to the amount of capital would operate as a fraud on such a creditor as fully and effectually as if he had personal knowledge of the existence of the defendants' stock, and believed it to have been paid for when he gave the credit. For this reason, among others, we think that all that it is necessary to allege or prove in that regard is that the plaintiff is a subsequent creditor; and that if the fact was that he dealt with the corporation with knowledge of the arrangement by which the "bonus" stock was issued, this is a matter of defense: *Gogebic Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427; 23 Am. St. Rep. 417. Counsel cites *Fogg v. Blair*, 183 U. S. 534, to the proposition that the complaint should have stated that this stock had some value; but that case is not in point, for the plaintiff there was a prior creditor; and as his debt could not have been contracted on the faith of stock not then issued, he could only maintain his action, if at all, by alleging that the corporation parted with something of value.

In one respect, however, we think the complaint is clearly insufficient. The thrasher company is here asking the intervention of the court to aid in enforcing an equity in favor of creditors against the stockholders, by declaring them liable to pay for this stock, contrary to their actual contract with the corporation. While the proceeding is not, strictly speaking, an equitable action, yet the relief asked is equitable in its nature. Under such circumstances, it was incumbent upon the thrasher company to show its own equities, and that it was in a position to demand such relief. It was not the original creditor of the car company, but the assignee of the original creditors. By that purchase, it, of course, succeeded, to whatever strictly legal rights its assignors had; but it is not rights of that kind which it is here seeking to enforce. Under such circumstances, we think it was incumbent upon it to state what it paid for the claims, or at least to show that it paid a substantial, and not a mere nominal, consideration. The only allegation is, that it paid "a valuable consideration."

This might have been only one dollar. It appears that it bought the claims after the car company had become insolvent, and its affairs were in the hands of a receiver; also, that the indebtedness of that company amounted to about three million dollars, and that there were not corporate assets enough to pay any considerable part of it. The mere chance of collecting something out of the stockholders does not ordinarily much enhance the selling price of claims against an insolvent corporation. If any person or company had gone to work and bought up for a mere song this large indebtedness of the car company for the purpose of speculating on the liability of the stockholders, no court would grant them the relief here prayed for. It would say to them: "We will not create and enforce an equity for the benefit of any such speculation." Counsel for respondent suggest that the thrasher company is but an organization of the original creditors, who formed it, and pooled their claims, so as to save something out of the wreck of the car company; but nothing of the kind is alleged. On this ground the demurrer should have been sustained.

In view of further proceedings, it may be proper to say that, in our opinion, there is nothing in the position that the right of recovery against the stockholders was barred by the statute of limitation. The argument in support of the proposition all rests upon the false premise that the cause of action accrued in May, 1882, when the *bonus* stock was issued. The corporation never had any cause of action against these defendants. As between them and the company, the agreement for the issue of the stock was valid. The creditors are not here seeking to enforce a right of action acquired through or from the corporation, but one that accrued directly to themselves, or for their benefit, and that did not accrue at least until the corporation became insolvent, in May, 1884.

Counsel for the St. Paul Trust Company stated that if the court should reverse the order appealed from on any of the grounds urged by the other appellants, it would not be necessary for us to consider any of the assignments of error peculiar to his appeal; but as we reverse upon a ground that may be remedied by amendment, we deem it proper to say that, in our opinion, the claim against the Kittson estate is a "contingent" claim, within the meaning of chapter 53 of the General Statutes of 1878.

Order reversed.

CORPORATIONS. — The doctrine that the property of a corporation is a trust fund for the payment of its debts is discussed in the extended note to *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 808, and following pages.

CORPORATIONS. — **UNPAID SUBSCRIPTION TO THE CAPITAL STOCK** is an asset to which creditors look for payment: *Gogebic Investment Co. v. Iron Chief Mining Co.*, 78 Wis. 427; 23 Am. St. Rep. 417; *Farnsworth v. Robbins*, 36 Minn. 369; *Barron v. Paine*, 83 Mo. 312; *Alling v. Wenzel*, 133 Ill. 265. A finding that certain alleged stockholders were stockholders includes a finding that every condition precedent to their becoming full stockholders and subject to liability has been performed or waived: *Arthur v. Clarke*, 46 Minn. 491. In most, if not all, states the creditor must have exhausted his remedies at law against the corporation before he can maintain a creditor's suit against the stockholders for their unpaid subscriptions; e. g., in California and Ohio: *Potter v. Dear*, 95 Cal. 578; *Barrick v. Gifford*, 47 Ohio St. 180; 21 Am. St. Rep. 798. In Colorado the procedure is regulated entirely by statute, but is equitable in its nature: *Universal etc. Ins. Co. v. Tabor*, 16 Col. 531.

CORPORATIONS. — **AGREEMENTS BETWEEN STOCKHOLDERS DIMINISHING LIABILITY** for unpaid subscriptions are valid, when no creditor is injured: *Winston v. Dorsett Pipe etc. Co.*, 129 Ill. 64; *Bates v. Great Western Tel. Co.*, 134 Ill. 536. But share-holders cannot, by a private arrangement with the corporation, make their shares non-assessable as against creditors; nor can they evade their liabilities by subscribing for stock, and then surrendering it to the corporation, and afterwards taking the same from the corporation at a reduced value: *Alling v. Wenzel*, 133 Ill. 264. On similar principles, an original issue of shares of stock in a corporation as paid up, at less than their nominal value, is held to be in violation of law, and against public policy: *Perry v. Tuscaloosa etc. Oil Co.*, 93 Ala. 364.

CORPORATIONS. — A stockholder is not answerable to the creditors of the corporation, unless he is a stockholder as between himself and the corporation: *Union Sav. Ass'n v. Seligman*, 92 Mo. 635; 1 Am. St. Rep. 776. The creditors who are seeking to recover of a holder of its stock an unpaid balance of his subscription claim through the corporation, and have no greater rights than it: *Glenn v. Garth*, 133 N. Y. 18.

STATE v. SHERIFF OF RAMSEY COUNTY.

[48 MINNESOTA, 236.]

CONSTITUTIONAL LAW. — **A STATUTE MAKING AN ARBITRARY CLASSIFICATION** with respect to the subjects over which it operates, based upon no reason suggested by a difference in their situation or circumstances disclosing the necessity or propriety of any different legislation in respect to them, is unconstitutional.

CONSTITUTIONAL LAW — **ARBITRARY DISCRIMINATIONS.** — A statute prohibiting the emission of dense smoke within a city, but providing that its provisions shall not be applicable to manufacturing establishments using the entire product of combustion, and the heat, power, and light produced thereby, within the building wherein the same are generated, or within a radius of three hundred feet therefrom, makes an arbitrary distinction between different classes of business, and is therefore void.

McKean and Goodwin, for the petitioner.

Daniel W. Lawler and J. C. Michael, for the sheriff and complainant.

VANDEBURGH, J. The relator was arrested upon a charge of creating or maintaining a nuisance in violation of Special Laws of 1889, chapter 375, declaring the emission of dense smoke within the city of St. Paul, under certain circumstances, a nuisance, and prescribing a penalty. He is brought before this court upon *habeas corpus*, and asks to be discharged on the ground of the invalidity of the act in question. One of the chief objections urged against its constitutionality is, that it is partial or class legislation. Section one (1) prohibits the emission of dense smoke within the city, with certain limitations as to distance, location, and surroundings; section two (2) prescribes the penalty; and section three (3) is as follows: "Nothing herein contained shall be construed to apply to manufacturing establishments using the entire product of combustion, and the heat, power, and light produced thereby, within the building wherein the same are generated, or within a radius of three hundred (300) feet therefrom." Legislation in different forms relating to particular classes or subjects has been under consideration by this court in *County Commissioners v. Jones*, 18 Minn. 199; *Bruce v. County Commissioners of Dodge County*, 20 Minn. 388; *Johnson v. Chicago etc. Ry Co.*, 29 Minn. 425, 431, 432; *Herrick v. Minneapolis etc. Ry Co.*, 31 Minn. 11; 47 Am. Rep. 771; *Merritt v. Knife Falls Boom Co.*, 34 Minn. 245; *Nichols v. Walter*, 37 Minn. 264; *State v. Spaude*, 37 Minn. 322; *Lavalles v. St. Paul etc. Ry Co.*, 40 Minn. 249; *Johnson v. St. Paul etc. R. R. Co.*, 43 Minn. 222; *State v. Donaldson*, 41 Minn. 74. In *Nichols v. Walter*, 37 Minn. 264, it was held that a law was general and uniform in its operation which operates equally upon all the subjects within the class for which the rule is adopted, but that the legislature cannot adopt an arbitrary classification, though it be made to operate equally upon each subject within the class; and the classification must be based on some reason suggested by such a difference in the situation and circumstances of the subjects placed in different classes as to disclose the necessity or propriety of different legislation in respect to them. In *State v. Donaldson*, 41 Minn. 74, a distinction or classification of dealers in medicines, based on the location of their places of business in respect to distance from

drug-stores, was held reasonable, and not a mere arbitrary distinction. In *Johnson v. St. Paul etc. R. R. Co.*, 43 Minn. 222, this court, in dealing with Laws 1887, chapter 13, defining the liability of railway companies to their employees, said, in substance, that not only must the statute treat alike, under the same conditions, all who are brought within it, but in its classifications it must bring within it all who are under the same conditions. "Such law must embrace all, and exclude none, whose condition and wants render such legislation necessary or appropriate to them as a class": *Randolph v. Wood*, 49 N. J. L. 85. This language is, of course, used in a broad and general sense, and is not to be given so technical or narrow a construction as to interfere with practical legislation. But applying the rule, as well established in this court, to the legislation under consideration, it can hardly stand the test of legal criticism. The provisions of section three (3) are somewhat obscure; but the only fair and reasonable construction to be given it is, that it is intended to except a class of manufacturers who limit the use of the heat, light, and power resulting from the combustion of smoke-producing material wholly within the prescribed radius. The counsel for the state contend that this must apply equally to all within the designated class, and that the exception thus made in the operation of the act is a reasonable one, because, from the nature of the prescribed limitations, the public injury or annoyance from the emission of smoke from such establishments would be not serious or specially objectionable to the public. The argument applies in so far as the particular class who are excepted from the operation of the statute is concerned, but it does not reach the objection that the classification is not sufficiently broad. No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar. The statute is leveled against the nuisance occasioned by dense smoke, and it can make no practical difference in what business the owners or occupants of the buildings in which such smoke is produced are engaged, or whether the heat evolved from the combustion of the fuel producing such smoke is applied to the generation of steam or other useful purposes; or further, whether steam-power is used in manufacturing, or is applied to other uses, as a grain-elevator or hoisting apparatus in a warehouse. We are obliged to hold that the distinction or classification attempted to be made is untenable. Section three (3) must be read in con-

nection with section one (1), and is evidently intended to be a limitation upon the latter section, and is so connected with it that its provisions must be regarded as inseparable from the general purpose and object of the act, so that the whole must stand or fall together. For these reasons we hold the act invalid.

The petitioner is therefore discharged.

STATUTES. — GENERAL AND SPECIAL LAWS: See notes to *State v. Ellet*, 21 Am. St. Rep. 780-789, and *State v. Hisman*, 23 Am. St. Rep. 25-29. General laws are those which operate alike on all persons to whom they apply, and apply equally to all persons in the same category within the jurisdiction of the law-making powers: *Osby v. Murphey*, 89 Cal. 522. The fact that an act is applicable to the conditions existing in a single city in the state will not necessarily render it local or special legislation. A law may be general, and yet be operative in a single place. It is not requisite that it should be presently applicable to every person or to every city within the state: *West Chicago Park Comm'rs v. McMullen*, 134 Ill. 170. A statute which is of general and uniform operation throughout the state, and operates alike upon all persons under the same circumstances, is not subject to the objection that it is special or local legislation: *Gilson v. Commissioners*, 128 Ind. 65; *Louisville etc. R'y Co. v. Wallace*, 136 Ill. 87. There is no constitutional interdiction of a general act that may by possibility produce local results: *In re Petition of Cleveland*, 51 N. J. L. 319. On the other hand, in *Commonwealth v. Reynolds*, 137 Pa. St. 390, it was held that the test is, not results actually produced, but possibilities. A special law is one relating to a selected class, as well as to a particular object: *Smith v. McDermott*, 93 Cal. 421. Therefore a statute applicable only to a particular city in the grade or class to which it belongs, and which cannot, by reason of its provisions, be adapted to any other city in the same grade or class, is special in its nature: *State v. Smith*, 48 Ohio St. 211. A *fortiori* is an act directed at one particular named municipal corporation alone special within the meaning of the constitution: *People v. Common Council*, 85 Cal. 369. A provision special in its nature is none the less special because inserted in the most general of laws: *People v. Central Pac. R. R. Co.*, 83 Cal. 393.

McARTHUR v. TIMES PRINTING COMPANY.

[48 MINNESOTA, 319.]

CORPORATIONS. — CONTRACTS MADE BY PROMOTERS OF A CORPORATION in anticipation of its organization may be ratified by it after its incorporation, and such ratification may be inferred from acts or acquiescence on its part, or that of its authorized agents, as well as from the formal action of its board of directors.

CORPORATIONS — PROMOTERS, CONTRACTS WITH. — If persons engaged in procuring the organization of a corporation to publish a newspaper enter into a contract with another person for his services as advertising solicitor for such newspaper for one year, and he, after the corporation is perfected,

enters its services pursuant to his contract, with the knowledge of its officers, and continues in such service for some months, the corporation may be deemed to have adopted the contract of its promoters, and held liable thereon.

CORPORATION — PROMOTERS' CONTRACT. — IF A CORPORATION ADOPTS A CONTRACT made by its promoters, such adoption cannot relate back to the making of the contract by the promoter; for the corporation having at that time no existence, and no power to contract, no act on its part can ratify such a contract as of a date anterior to the creation of the corporation.

STATUTE OF FRAUDS — CONTRACT NOT TO BE PERFORMED WITHIN A YEAR. — A contract between promoters of a corporation and another person, that he will serve the corporation for the period of one year after its organization, is not within the statute of frauds, because the contract, so far as the corporation is concerned, could have no existence until after its organization.

George F. Edwards, for the appellant.

F. B. Wright, for the respondent.

MITCHELL, J. The complaint alleges that about October 1, 1889, the defendant contracted with plaintiff for his services as advertising solicitor for one year; that in April, 1890, it discharged him, in violation of the contract. The action is to recover damages for the breach of the contract. The answer sets up two defenses: 1. That plaintiff's employment was not for any stated time, but only from week to week; 2. That he was discharged for good cause. Upon the trial there was evidence reasonably tending to prove that in September, 1889, one C. A. Nimocks, and others, were engaged as promoters in procuring the organization of the defendant company to publish a newspaper; that about September 12th, Nimocks, as such promoter, made a contract with plaintiff, in behalf of the contemplated company, for his services as advertising solicitor for the period of one year from and after October 1st, — the date at which it was expected that the company would be organized; that the corporation was not in fact organized until October 16th, but that the publication of the paper was commenced by the promoters October 1st, at which date plaintiff, in pursuance of his arrangement with Nimocks, entered upon the discharge of his duties as advertising solicitor for the paper; that after the organization of the company, he continued in its employment, in the same capacity, until discharged, the following April; that defendant's board of directors never took any formal action with reference to the contract made in its behalf by Nimocks, but all of the stockholders, directors, and officers of the corporation knew of this contract

at the time of its organization, or were informed of it soon afterwards, and none of them objected to or repudiated it, but, on the contrary, retained plaintiff in the employment of the company without any other or new contract as to his services.

There is a line of cases which hold that where a contract is made in behalf of, and for the benefit of, a projected corporation, the corporation, after its organization, cannot become a party to the contract, either by adoption or ratification of it: *Abbott v. Hapgood*, 150 Mass. 248; 15 Am. St. Rep. 193; *Beach on Corporations*, sec. 198. This, however, seems to be more a question of name than of substance; that is, whether the liability of the corporation, in such cases, is to be placed on the grounds of its adoption of the contract of its promoters, or upon some other ground, such as equitable estoppel. This court, in accordance with what we deem sound reason, as well as the weight of authority, has held that while a corporation is not bound by engagements made on its behalf by its promoters before its organization, it may, after its organization, make such engagements its own contracts; and this it may do precisely as it might make similar original contracts, formal action of its board of directors being necessary only where it would be necessary in the case of a similar original contract; that it is not requisite that such adoption or acceptance be expressed, but it may be inferred from acts or acquiescence on part of the corporation, or its authorized agents, as any similar original contract might be shown: *Battelle v. Northwestern Cement and Concrete Pavement Co.*, 37 Minn. 89. See also *Morawetz on Corporations*, sec. 548. The right of the corporate agents to adopt an agreement originally made by promoters depends upon the purposes of the corporation and the nature of the agreement. Of course the agreement must be one which the corporation itself could make, and one which the usual agents of the company have express or implied authority to make. That the contract in this case was of that kind is very clear; and the acts and acquiescence of the corporate officers, after the organization of the company, fully justified the jury in finding that it had adopted it as its own.

The defendant, however, claims that the contract was void under the statute of frauds, because, "by its terms, not to be performed within one year from the making thereof," which counsel assumes to be September 12th, the date of the agreement between plaintiff and the promoter. This proceeds

upon the erroneous theory that the act of the corporation in such cases is a ratification which relates back to the date of the contract with the promoter, under the familiar maxim that "a subsequent ratification has a retroactive effect, and is equivalent to a prior command." But the liability of the corporation, under such circumstances, does not rest upon any principle of the law of agency, but upon the immediate and voluntary act of the company. Although the acts of a corporation with reference to the contracts made by promoters in its behalf before its organization are frequently loosely termed "ratification," yet a "ratification," properly so called, implies an existing person, on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence: *In re Empress Engineering Co.*, 16 Ch. Div. 128; *Melhado v. Porto Alegre etc. Ry Co.*, L. R. 9 Com. P. 505; *Kelner v. Baxter*, L. R. 2 Com. P. 185. What is called "adoption" in such cases is, in legal effect, the making of a contract of the date of the adoption, and not as of some former date. The contract in this case was, therefore, not within the statute of frauds. The trial court fairly submitted to the jury all the issues of fact in this case, accompanied by instructions as to the law which were exactly in the line of the views we have expressed; and the evidence justified the verdict.

The point is made that plaintiff should have alleged that the contract was made with Nimocks, and subsequently adopted by the defendant. If we are correct in what we have said as to the legal effect of the adoption by the corporation of a contract made by a promoter in its behalf before its organization, the plaintiff properly pleaded the contract as having been made with the defendant. But we do not find that the evidence was objected to on the ground of variance between it and the complaint. The assignments of error are very numerous, but what has been already said covers all that are entitled to any special notice.

Order affirmed.

CORPORATIONS.—LIABILITY FOR CONTRACTS ENTERED INTO BY PROMOTERS BEFORE INCORPORATION: See notes to *Moore etc. Hardware Co. v. Towers Hardware Co.*, 13 Am. St. Rep. 23, and *Pittsburg Mining Co. v. Spooner*, 17 Am. St. Rep. 161; *Stanton v. New York etc. Ry Co.*, 59 Conn. 272; 21 Am. St. Rep. 110.

KURTZ v. ST. PAUL AND DULUTH R. R. Co.

[48 MINNESOTA, 389.]

JURISDICTION OF NON-RESIDENT MINORS. — The power of the courts of the state to appoint a guardian for non-resident minors having property within its jurisdiction is unquestionable.

JURISDICTION OF MINORS. — Notice to a minor of an application for the appointment of a guardian is purely a matter of statutory requirement, and, when not required by statute, need not be given.

JURISDICTION OF MINORS. — If a statute declares that such notice shall be given of an application to appoint a guardian of a minor to all persons interested as the judge shall order, letters of guardianship cannot be attacked on the ground that the notice which he directed to be given was insufficient because it did not include notice to the minors themselves.

GUARDIAN'S SALE CANNOT BE COLLATERALLY ATTACKED in an action between third persons on the ground that the purchaser was the attorney of the guardian.

J. W. Bull, and Smith and Towns, for the appellants.

Lusk, Bunn, and Hadley, for the respondent.

MITCHELL, J. Action of ejectment. In its answer the defendant alleged title in itself, but this claim is now abandoned, and the action of the plaintiffs is sought to be defeated solely on the ground of their own want of title. One George Leidner died seised of the land, and the plaintiffs, as his heirs, are the owners, unless their title was divested by a guardian's sale to one Hiram Hayes, in May, 1872. The probate proceedings which culminated in this sale are the same which were considered in *West Duluth Land Co. v. Kurtz*, 45 Minn. 380, but the questions now raised are different. The principal point made is, that the appointment of Catharine Burg as guardian of the plaintiffs was absolutely void for want of notice to the minors of the hearing of her application for such appointment. The admitted facts are, that the plaintiffs were infants, residing, in Wisconsin, with their mother, Catharine Burg, and owning this land in St. Louis County, in this state. Their next of kin were their mother, with whom they were living, and a married sister, Mary Burns, residing in Duluth, in this state. On February 27, 1872, the mother petitioned the probate court of St. Louis County for letters of guardianship. On the same day, that court ordered that a hearing be had on the petition, March 2, 1872, and that notice be given of said hearing to all persons interested, by personal service on the next of kin, two days before the hearing. The mother, who was the plaintiffs'

natural guardian, and with whom they resided, had notice by being herself the petitioner, and notice was served personally on Mary Burns, their sister, on the said twenty-seventh day of February. It is objected that this notice to the next of kin was not notice to the minors; that notice to the minors themselves was necessary to give the court jurisdiction, and to make the appointment of any validity.

The power to appoint a guardian of the estate of a non-resident minor situated in this state is unquestioned, and the purpose of so doing is the same as in appointing a guardian of the person and estate of a resident minor. Notice of the hearing for such appointment is not a constitutional prerequisite to the jurisdiction to name a guardian. Appointing a guardian deprives no one of his property, and does not change or affect the title of it. Letters of guardianship are merely a commission which places the property of the ward in the care of an officer of the court as custodian, and in its effect is not essentially different from the appointment of a receiver or temporary administrator,—a jurisdiction which can be, and frequently is, exercised before service of any process. The matter of notice of an application for the appointment of a guardian is therefore purely a matter of statutory requirement. The provision of statute regulating notice in this case is found in General Statutes of 1866, chapter 59, section 13 (Gen. Stats. 1878, c. 59, sec. 21), viz.: "Such notice to all persons interested as the judge shall order." My own opinion is, that when it appears that the person or property was the subject of guardianship, and that the letters were issued by the proper probate court, as were the facts here, the letters of guardianship are not subject to collateral attack, but, like letters of administration, are conclusive evidence of the due appointment of the person therein named, until reversed on appeal, or revoked by the court which granted them. This is the rule in most jurisdictions; and the practical difficulties and embarrassments resulting from a different rule are very apparent. But in *Davis v. Hudson*, 29 Minn. 27, this court held that while the manner of notice is committed to the discretion of the probate judge, yet some notice is indispensable; that notice is jurisdictional; and that the validity of the guardianship is subject to collateral attack on the ground of want of any notice of the application for the appointment.

In the present case there is no question but that all the notice was given which the probate judge ordered, but the

contention is, that what the judge ordered was insufficient, because it did not include notice to the minors themselves. The statute clearly commits it to the sound discretion of the judge to decide how and in what manner notice shall be given, and to fix the kind of notice most likely to serve the ends of justice, and protect the interests of the infants. Similar provisions in similar statutes are quite common, and it is agreed with one accord that the purpose is to give notice to relatives or next of kin who are naturally interested in the infants or their estates so as to give them an opportunity to attend, if they desire, for the purpose of giving the probate court the requisite information as to the nature and value of the estate of the infant, and as to the propriety or impropriety of the appointment, as guardian, of the person named in the petition: *Underhill v. Dennis*, 9 Paige, 202; *White v. Pomeroy*, 7 Barb. 640; *Ex parte Dawson*, 8 Bradf. 180. Notice to the infants is not the important or essential thing, for the very necessity for appointing a guardian for them arises out of the fact that they are incapable of managing their own estate, or of determining for themselves what is for their own interests. If they are of very tender years, and strictly *non sui juris*, notice to them would be an idle ceremony, and utterly useless. Hence we conclude that the notice contemplated by statute does not necessarily require or include notice to the infants themselves, but that it is left to the sound discretion of the probate judge to order such notice to persons interested as natural guardians and next of kin as he shall deem most likely to inform them of the application, and thus, through their attendance, advise him of the extent and condition of the infants' estate, and of the expediency of the appointment prayed for. Notice to the mother, with whom plaintiffs lived, and to their married sister, their only other near relative, was more likely to accomplish this end than publication, or even personal service on the infants themselves, and fully answered the statutory requirement.

The objection that Hayes was disqualified from purchasing at the guardian's sale because he was attorney for the guardian is one that cannot be made available in an action of ejectment between other parties. The purchase by Hayes is at least valid as to third parties until set aside by direct attack. There is nothing in the point that the deed does not describe or include the land in controversy.

Judgment affirmed.

GUARDIAN AND WARD—APPOINTMENT OF GUARDIAN OF NON-RESIDENT MINOR.—A probate court of this state may appoint a guardian for a non-resident minor as respects any estate he may have in this state: *West Duluth Land Co. v. Kurtz*, 45 Minn. 380; *Shelby v. Harrison*, 84 Ky. 144. Where an infant resides in another state, but has property here, he may have guardians appointed in both jurisdictions; the foreign guardian has the custody of his person, and the domestic guardian has control of his property within this state, and neither can interfere with the other: *Kraft v. Wickey*, 4 Gill & J. 332; 23 Am. Dec. 569, and note. The probate court of a county in this state, in which there is realty of a ward residing in another state, under guardianship by appointment of a guardian in another state, is the "probate court having jurisdiction," upon an application of such guardian to sell the realty situated here: *Menage v. Jones*, 40 Minn. 254. See also *Boyd v. Glass*, 34 Ga. 253; 89 Am. Dec. 252, and note. As to the appointment, rights, powers, and duties of guardians of non-resident minors, see note to *Earl v. Dresser*, 95 Am. Dec. 686, and note to *Molyneux v. Seymour*, 76 Am. Dec. 669.

OVERMIRE v. HAWORTH.

[48 MINNESOTA, 372.]

CREDITOR'S BILL—RESULTING TRUSTS.—If the statute of a state provides that when property purchased by the debtor is conveyed to a third person, with intent to defraud the creditors of such debtor, a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their demands, they may, if residents of the state, prosecute an action to enforce such trust, without first obtaining judgment on their demand, if their debtor is a non-resident of the state, and has no property therein which can be appropriated to the satisfaction of the debt by legal proceedings.

O. L. Smith, and Brooks and Hendrix, for the appellant.

Hahn and Hawley, for the respondent.

DICKINSON, J. This action is prosecuted to enforce a resulting trust, under General Statutes of 1878, chapter 43, sections 7, 8, as respects certain land in this state, which, upon purchase, were conveyed to the defendant, her husband, one L. L. Haworth, having paid the whole consideration therefor. The plaintiff is a simple contract creditor of L. L. Haworth, who resided in the state of Illinois when the debt was contracted, and who ever since has resided there. The said debtor, Haworth, has never owned any property within this state. He procured the conveyance of the land in question to be made to the defendant, his wife, with intent to defraud his creditors, including the plaintiff. It does not appear whether the debtor, Haworth, is solvent or insolvent. By the terms of the statute above cited, a trust in the land results in

favor of the creditors of the person paying the consideration "to the extent that may be necessary to satisfy their just demands." In *Massey v. Gorton*, 12 Minn. 145, 90 Am. Dec. 287, it was said that a mere simple contract creditor is not entitled to relief under this statute; that he must obtain judgment at law before seeking relief in equity. And in *Moffatt v. Tuttle*, 35 Minn. 301, it was decided that a creditor is not entitled to such relief until he has exhausted his remedies at law. It was considered, in that case, to be a sufficient reason for refusing the aid of equity to enforce the statutory trust, that it was not shown that execution had been returned unsatisfied, or that the judgment debtor was insolvent, or had no property subject to execution. It must be regarded as the general rule, in this state at least, that the creditor must proceed to recover and enforce judgment at law against his debtor before he will be allowed to maintain an action of an equitable nature to enforce the statutory trust. But the rule which forbids resort to equity for relief when there is an adequate legal remedy is not to be applied with such strictness as to practically deny to a party having a right against another, legal or equitable, any reasonably available means of enforcing it. It is true that an equitable suit will not be entertained if there is no necessity for resorting to such a proceeding. But even though the law does offer a remedy which may be resorted to, still, if it be not adequate to the requirements of the case, equity should not refuse its aid within the proper scope of its jurisdiction. If the legal remedy be not reasonably available and effectual, there would seem to be no reason forbidding resort to equitable relief. For instance, a fraudulent debtor may abscond to some distant but known place, as to India, leaving no property within our jurisdiction which can be reached by attachment or ordinary legal proceedings, but leaving property which, by the aid of a court of equity, may be reached and appropriated to the satisfaction of his debts. We think that equity would not refuse to exercise its ordinary jurisdiction in favor of a creditor, under such circumstances, for the reason merely that he might secure a legal recovery and satisfaction in India, but at an expense far greater than the amount of his debt. In such a case, and in others which will readily occur to the mind, it is obvious that the ordinary course of legal proceedings affords in reality no adequate or real means of redress.

Upon the point here in question there is a conflict of au-

thority. We think that the better reason supports the view that the resulting trust created by the statute may be enforced in favor of one of our citizens, even though he has not recovered a judgment for his debt, the debtor being a non-resident, and beyond the jurisdiction of our courts, and having no property here which can be appropriated by legal proceedings to the satisfaction of the debt. In support of this conclusion the following authorities may be cited: *Merchants' Nat. Bank v. Paine*, 13 R. I. 592; *Kipper v. Glancey*, 2 Blackf. 356; *Stanton v. Embry*, 46 Conn. 595; *Peay v. Morrison's Ex'rs*, 10 Gratt. 149; *Scott v. McMillen*, 1 Litt. 302; 13 Am. Dec. 239; *Anderson v. Bradford*, 5 J. J. Marsh. 69; *Kinloch v. Meyer*, 1 Speers Eq. 427; *Farrar v. Haselden*, 9 Rich. Eq. 331; *Pendleton v. Perkins*, 49 Mo. 565; and see High on Injunctions, sec. 29.

In so deciding we decline to follow or to apply in the case before us the ruling upon the last ground stated in the opinion in *Birdsall v. Fischer*, 17 Minn. 100. The case before us does not require that we consider or determine whether the non-residence of a debtor and the non-existence of a legal remedy in the courts of our own state is always to be regarded as a sufficient reason for invoking the aid of equity. It is sufficient to say that such a case is deemed to justify the enforcement, in favor of a resident creditor, of the specific trust resulting under the statute from the fraudulent conduct of the non-resident debtor in procuring property purchased by him, and over which our jurisdiction extends, to be conveyed to a voluntary grantee for the purpose of keeping it beyond the reach of his creditors. The objection that the plaintiff had not reduced his demand to judgment, as he could not have done without going to a foreign state for that purpose, and that the proof of his debt in this action was not conclusive personally upon the debtor, is not a sufficient reason for refusing to enforce the trust which was imposed on the land when the debtor purchased it, and for the purpose of defrauding his creditors, procured the conveyance to be made to the defendant. This objection might be urged with equal force against the propriety of allowing legal proceedings by attachment against the property of non-resident debtors to satisfy debts for which no personal judgment is recovered.

Judgment affirmed.

CREDITOR'S SUIT — JUDGMENT AT LAW, WHEN NOT NECESSARY TO MAINTAIN. — A creditor may, without a judgment at law, have a fraudulent sale

set aside, under the Mississippi statute: *Comstock v. Rayford*, 1 Smedes & M. 423; 40 Am. Dec. 102, and note. See extended note to *Massey v. Gorton*, 99 Am. Dec. 296, also note to *Miller v. Davidson*, 44 Am. Dec. 722, and especially note to *Quari v. Abbott*, 52 Am. Rep. 673.

FULLINGTON v. NORTHWESTERN IMPORTERS' AND BREEDERS' ASSOCIATION.

[45 MINNESOTA, 490.]

FRAUDULENT TRANSFER. — A SUBSEQUENT CREDITOR CANNOT avoid a conveyance by his debtor, not intended to nor operating to defraud him, on the ground that it was executed to defraud existing creditors.

Haynes and Chass, for the appellant.

Little and Nunn, for the respondent.

GILFILLAN, C. J. The nature of the instrument under which the garnishee defendant claims title to the property is, as the plaintiff claims it to be, a common-law assignment for the benefit of creditors. Although it is not very clear that the assignor had at its date any creditors who did not assent to the assignment by signing it, we may assume that he had, and that, as to them, the assignment is fraudulent, and consequently void. There is no evidence of any intent to defraud any who might become creditors after its execution; that it was made with any reference to or in contemplation of future debts of the assignor; and there is nothing in its character, nor in the acts of the parties under it, to make it operate as a fraud upon such creditors. The plaintiff is a subsequent creditor, so that the question is presented, Can a subsequent creditor avoid a conveyance by his debtor, not intended to nor operating to defraud him, on the ground that it was executed with intent to defraud existing creditors? This court has always held he cannot: *Bruggerman v. Hoerr*, 7 Minn. 337; 82 Am. Dec. 97; *Stone v. Myers*, 9 Minn. 303; 86 Am. Dec. 104; *Sanders v. Chandler*, 26 Minn. 273; *Hartman v. Weiland*, 36 Minn. 223; *Bloom v. Moy*, 43 Minn. 397; 19 Am. St. Rep. 243. One expression in *Walsh v. Byrnes*, 39 Minn. 527, may point to a different conclusion, but the entire opinion is to the effect that to enable a subsequent creditor to avoid a transfer as fraudulent, it must appear that its purpose was, or that its effect will be, to defraud him. An intent to defraud existing creditors may, in connection with other circumstances, be evidence on

the question of intent to defraud subsequent or prospective creditors: *Union Nat. Bank v. Pray*, 44 Minn. 168. There is no little confusion in the authorities on the point, there being many *dicta* to the effect, and some decisions directly holding, that a subsequent creditor may avoid a conveyance fraudulent as to existing creditors, and other decisions — the majority of the more modern decisions — holding the contrary. Few hold unqualifiedly that a conveyance is void as to subsequent creditors merely because made with intent to defraud creditors who were such at the time of its execution. In most of the decisions of the former class referred to, the effect as to subsequent creditors is made to depend on the circumstances under which the conveyance with intent to defraud existing creditors was made. In this state, where the question of the fraudulent intent is one of fact, and not of law, the circumstances referred to in those cases would not make the conveyance void *per se*, but would be evidence of a fraudulent intent as to subsequent creditors. The evidence might be of such a character — as where the fraudulent intent appears by the instrument making the conveyance — as to be conclusive, and compel a finding of its existence. It seems reasonable that a creditor assailing a conveyance by his debtor should stand on its intent or effect as to himself, and that A ought not to be permitted to avoid it merely because it was intended to or will prejudice B. A conveyance may be made with intent to defraud existing, but without such intent as to subsequent, creditors, or it may be with intent to defraud only subsequent creditors, or it may be to defraud both classes. The purpose of the rule of the common law, and of the statute which reasserts that rule, is to defeat the intended fraud, which it does by making the conveyance void as to the persons intended to be defrauded, and who will be defrauded unless it be avoided. The statute (13 Eliz., c. 5), which all subsequent statutes follow in substance, if not in terms, avoided the conveyance “only as against those persons, their heirs,” etc., “whose actions,” etc., “are defrauded.” There is no warrant in it for holding that one class of creditors may avoid a conveyance merely on the ground that it was intended to, and if sustained will, defraud another class.

Judgment affirmed.

FRAUDULENT CONVEYANCES — RIGHT OF SUBSEQUENT CREDITORS TO ATTACK. — For a full discussion of this subject, see extended note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 743-754. A creditor, to obtain relief against

a fraudulent disposition of property, must show that he was a creditor at the time that the act was done, and that it was in fraud of his rights: *Stone v. Myers*, 9 Minn. 303; 86 Am. Dec. 104, and note; *Reid v. Gray*, 37 Pa. St. 508; 78 Am. Dec. 444. A conveyance is not void as against subsequent creditors unless fraudulent in fact, — that is, made with a view to future debts: *Horn v. Volcano Water Co.*, 13 Cal. 62; 73 Am. Dec. 569, and note; *Inhabitants of Pelham v. Aldrich*, 8 Gray, 515; 69 Am. Dec. 266, and note; *Bulkit v. Taylor*, 34 Miss. 708; 69 Am. Dec. 412, and note; *Nicholas v. Ward*, 1 Head, 323; 73 Am. Dec. 177; *Cook v. Johnson*, 12 N. J. Eq. 51; 72 Am. Dec. 381, and note; *Bewick v. Muir*, 83 Cal. 368. See also *Rollins v. Shaver Wagon etc. Co.*, 80 Iowa, 390; 20 Am. St. Rep. 427.

IN RE HESS'S WILL.

[48 MINNESOTA, 504.]

WILLS — UNDUE INFLUENCE. — CIRCUMSTANCES RELIED UPON TO PROVE UNDUE INFLUENCE must be such as, taken together, point unmistakably to the fact that the mind of the testator was subjected to that of some other person, so that his will is that of the latter, and not of the former.

WILLS. — BURDEN OF PROVING FRAUD OR UNDUE INFLUENCE rests upon the contestants of the will.

WILLS — UNDUE INFLUENCE. — While evidence of declarations of a testator, made subsequent to the execution of his will, may be received for the purpose of showing the extent and effect of the undue influence claimed to have been exercised over him, yet if the evidence, independent and exclusive of his declarations, does not satisfy the jury that undue influence was used in procuring the will, they must answer the question of undue influence in the negative. The evidence of undue influence must be other than that which proceeds from the testator's own mouth after the will was made.

WILLS. — UNDUE INFLUENCE IS NOT ESTABLISHED by the fact that there were motive and opportunity. It must further appear that the influence was exercised, and that its effect was to destroy the free agency of the testator, and to control the disposition of his property under the will.

WILLS — UNDUE INFLUENCE. — THE INFLUENCES RESULTING IN FAVOR OF PERSONS WHO ARE NEAREST the testator in respect and affection, or by reason of intimate social or domestic relations, cannot be regarded as undue.

WILLS. — UNDUE INFLUENCE CANNOT BE PRESUMED from the mere fact that the provisions of the will are much more favorable to some of the beneficiaries than to others.

Lloyd Barber, for the proponents.

Keyes and Brown, for the contestants.

VANDERBURGH, J. Timothy Hess, late of Winona County, died testate, in December, 1889, leaving him surviving five children, James Hess, Mrs. Ella Dearborn, Mrs. Mary Foster,

Mrs. Emma Ryan, and Cornelius Hess. He was upwards of seventy years old. His will was executed September 24, 1888. In this will, James Hess and Mrs. Ella Dearborn were named executors, and legacies of fifty dollars each, only, were left to Mrs. Foster, Mrs. Ryan, and Cornelius Hess, a legacy of five hundred dollars to George Ford, a son of Mrs. Dearborn, and all the rest and residue of the estate of the deceased was given and devised to the executors, James Hess and Mrs. Dearborn, share and share alike. The estimated value of the estate was about five thousand dollars. The validity of this will is contested by Mrs. Foster and Mrs. Ryan and Cornelius Hess, who alleged that the same was procured to be executed through the fraud of James Hess and Mrs. Dearborn, and constraint and undue influence by them executed and exercised over the mind of the testator at the time of the execution thereof. On appeal from the order and judgment of the probate court, the issue of fraud and undue influence was tried by jury in the district court of Winona County, and a verdict thereon rendered in favor of the contestants.

One of the principal assignments of error is, that the finding and verdict of the jury are not justified by the evidence. It is contended by the proponents that there was no evidence of fraud or undue influence in the case warranting the submission of the question to the jury. It is not necessary, in considering this assignment of error, to review the evidence *in extenso*, or to make special reference to the testimony of the several witnesses. It will be sufficient to refer to such parts of it as may be necessary to show the basis of our conclusions upon this question. What is and is not undue influence has been considered and declared in our former decisions, and we need do little more than refer to them here: *In re Storer's Will*, 28 Minn. 11; *Nelson's Will*, 39 Minn. 205-208; *Mitchell v. Mitchell*, 43 Minn. 73. It is said, in *In re Storer's Will*, 28 Minn. 11, "From the nature of the case, the evidence of undue influence will be mainly circumstantial. It is not usually exercised openly, in the presence of others, so that it can be directly proved. But the circumstances relied on to show it must be such as, taken together, point unmistakably to the fact that the mind of the testator was subjected to that of some other person, so that the will is that of the latter, and not of the former." But the burden of proof rests upon the contestants to establish the existence of fraud or undue influence; and

that, we are obliged to hold, after a very careful and thorough consideration of the evidence in this case, they failed to do.

Evidence was received, on the trial, of the declarations of the testator subsequent to the execution of the will, for the purpose of showing the extent and effect of the undue influence claimed to have been exercised over him when the will was made; but the court correctly charged the jury that if the evidence, independent and exclusive of the testator's declarations, did not satisfy them that undue influence was used in procuring the making of the will, they must answer the question of undue influence in the negative. And this must, of course, be so; otherwise the fact would be permitted to be proved by such declarations, though not part of the *res gestæ*. The evidence of undue influence must be other than that which proceeds from the testator's own mouth after a will is made. And in this case the evidence fails to show, apart from such declarations, that there had been either such pressing solicitations or fraudulent practices on the part of the proponents as to amount to moral coercion of the testator, not only affecting his judgment, but overriding his free agency also. Indeed, with the exception of the testimony of the witnesses to the will of what transpired at the time it was drawn and executed, there is no evidence of any importance on the main issue. It is not enough that there be motive and opportunity, as the evidence undoubtedly tends to show there were in this case, but the influence must be exercised and take effect so as to destroy the free agency of the testator, and control the disposition of the property under the will when it is made. Unless the influence of these beneficiaries was unfairly and unlawfully executed, so as to dominate his will at the time, it is not material that they were interested in the will, or had better opportunities for solicitation or persuasion than the contestants. Nor is it surprising that a testator should favor those who are nearest to him in respect and affection, or by reason of intimate social or domestic relations. The influences growing out of such causes must be allowed to have their natural and legitimate effect upon the mind of the testator, so that, if he chooses to make unwise and apparently unjust discrimination among those who are the natural objects of his bounty, he is at liberty to do so; for when he comes to make his will, he is entitled to distribute his property as he pleases, provided only that, in the exercise of this right, his mind is under no such constraint or moral coercion as to interfere with his free

agency: *Mitchell v. Mitchell*, 43 Minn. 73. The principal actors in this contest are Mrs. Dearborn and Mrs. Foster, who is the chief contestant. The record shows, we think, quite clearly that the testator was previously dissatisfied with the conduct and social relations of Mrs. Ryan and Mrs. Foster. And though he had not forgotten that Mrs. Foster had, years before, rendered him valuable service in his household after the decease of his wife, yet he was displeased at her marriage, and feared and believed that any property which she might receive would be squandered. And we gather from the record sufficient evidence, we think, to warrant the belief that there were grounds for such dissatisfaction on the part of the testator.

As respects the specific charge of fraud growing out of the alleged representations of Mrs. Dearborn, we dismiss it by saying that it is not sustained by the evidence; nor does the record present a much stronger case of undue influence. The testator had made his home with his son, James, on the farm of the latter, in Winona County, for several years before his death. Mrs. Dearborn lived in Chicago. A few days before the will was executed, Mrs. Dearborn came on a visit to her father, and remained till after its execution, when her father went with her to Chicago, but afterwards returned to Minnesota, and, before his death, visited Mrs. Foster in Wisconsin. As respects James, the evidence shows that he brought his father and sister to the magistrate when the will was made. His father also left with him the key to his box in a safety-vault, where the testator had deposited it before he went to Chicago. A witness also testifies that Mrs. Dearborn said, in presence of the magistrate and her father, that James did not want the contestants to be allowed any more than a nominal sum each, in the will, — "just enough to prevent breaking the will." There is no other evidence connecting him with the will. But Mrs. Dearborn was present when the will was made, and talked with other persons present, including the testator, about its provisions. The testator was of sound mind, and unquestionably competent to make a will, and a man of resolute and determined purpose. Searl (who drew the will) and his wife were the principal witnesses in the case. Searl swears that Mrs. Dearborn said, when they came in, that her father had come to have a will made, and she came to tell him how they wanted it made, or how their father wanted it made. Then he says the testator said he "wanted to make

his will, and told him how he wanted it made." Searl was greatly surprised at the inequality of the bequests in the will, and so expressed himself. This led to more or less conversation, particularly in respect to further provision for Mrs. Foster. It seems that the testator was not very communicative, but said, in substance, in reference to Mrs. Foster, that he would like to give her more, but her husband would squander it. The witness stated that the testator was not satisfied, and was uneasy and restless; but it distinctly appears that after all the suggestions were made, and notwithstanding all that was said, he firmly adhered to his purpose to make his will as he had at first indicated. The witness Searl states, on his cross-examination: "Mrs. Dearborn did not dictate the will to me. I drew the will as he dictated it. Q. And drew it just as he told you, I suppose? A. Yes, sir. Q. Now, then, you state that Mr. Hess appeared to be thoughtful, very silent, peculiar in his manner, do you? A. I did not see anything peculiar about him at that time. I may have expressed it in that way. I don't remember. Q. Do you now state that when you were talking over the will, he was decided in making it as he dictated it? A. Yes, sir; he was decided. Q. That the will should be as he dictated? A. Yes, sir; he did not want it changed, as he had arranged it in his mind." So that it is quite apparent that the testator was not influenced to change the nature of the bequests or the frame of the will by anything that occurred at the office of the magistrate, where it was drawn and executed. It was already "arranged in his mind." And there is nothing to show either that in forming his purpose or in adhering to it he was unduly influenced, or that the instrument was not his will, as he understood and declared it to be. The witness further states that "after it was completed, he said it might not amount to anything." He knew that he could alter it afterwards if he desired to do so, and he was advised by some of the witnesses to do so, but did not. He visited his daughter Mrs. Foster during the summer before he died, and it appears that she understood that he had made his will, and knew that she was not favored, and she endeavored afterwards to induce him to change it, but could not prevail on him to do so.

The more closely the case is examined in the light of all the testimony, the more clearly it appears that there is no sufficient proof of facts from which undue influence can be inferred. The testator was a man of strongly marked charac-

teristics, of sound mind and determined will, abundantly able to protect himself, — a matter not to be overlooked in considering a case of this kind; and as long as the law permits a disposition of property by will different from that which the statute makes in case of intestacy, the mere fact that the testator makes an unequal, partial, or seemingly unjust division of his property is no ground for setting it aside. The provisions of the will may be considered, in connection with other evidence, in trying the question of undue influence, but is not itself evidence of such influence; and the court cannot assume to judge of the justice of the provisions of the will, or to question the motives of the testator in making it: *Cudney v. Cudney*, 68 N. Y. 152; *Nelson's Will*, 39 Minn. 205; *Latham v. Udell*, 38 Mich. 238.

Order reversed.

Undue Influence as Affecting the Validity of Wills.*

No Precise Test Possible. — That undue influence exercised over a testator will invalidate a will executed by him as the result of its domination is everywhere conceded, and it is therefore of the utmost importance that some test be formulated, by the application of which to established facts a correct conclusion may be reached as to whether or not a will is incurably tainted by this vice. We must, however, confess at the outset that such a test has not been, and cannot be, prescribed, and that each case must be left to be decided in the light of its attendant circumstances: *Elkinton v. Brick*, 44 N. J. Eq. 154; *Waddington v. Bushy*, 45 N. J. Eq. 173; 14 Am. St. Rep. 706; *Hartman v. Strickler*, 82 Va. 225. It is not the means employed, so much as the effect produced, which must be considered in determining whether undue influence has contributed to the making of a will; for no matter what means have been employed for influencing the judgment or overcoming the will of the testator, yet if he was able to resist them, and, notwithstanding their existence, to make a disposition of his property according to his own desires, that disposition must stand, because the influences were unavailing. Though, on the other hand, the influence exerted over the testator was such as if applied under ordinary circumstances, or exercised over persons of ordinary powers of resistance, would be regarded as innocent, yet if, in the particular case, it resulted in a disposition of property contrary to the testator's desire, the influence was undue: *Leecraft's Heirs v. Carleton*, 19 Ala. 80.

General Definitions. — Though no precise or absolute test of undue influence has been or can be formulated, equally applicable to all cases, still, many general definitions have been given of sufficient accuracy to be of value in considering this topic. "Undue influence, legally speaking, must be such as, in some measure, destroys the free agency of the testator; it must

* REFERENCE TO MONOGRAPHIC NOTES.

Declarations of a testator as evidence of undue influence or of imposition: 3 Am. Dec. 395-399.

Influence or importunity sufficient to invalidate a will: 16 Am. Dec. 237-239.

Presumptions of undue influence: 21 Am. St. Rep. 94-104.

be sufficient to prevent the exercise of that discretion which the law requires in relation to every testamentary disposition. It is not enough that the testator is dissuaded by solicitations or argument from disposing of his property as he had previously intended; he may yield to the persuasions of affection or attachment, and allow their suggestion to be exerted over his mind; and in neither of these cases would the law regard the influence as undue. To amount to this, it must be equivalent to moral coercion, — it must constrain its subject to do what is against his will, but which, from fear, the desire of peace, or some other feeling, he is unable to resist; and when this is so, the act which is the result of that influence is vitiated": *Gilbert v. Gilbert*, 22 Ala. 529; 58 Am. Dec. 268; *Dunlap v. Robinson*, 28 Ala. 100; *Taylor v. Kelly*, 31 Ala. 59; 68 Am. Dec. 150; *Hall's Heirs v. Hall's Heirs*, 38 Ala. 131; *O'Neill v. Farr*, 1 Rich. 80. "On this subject, as on that with regard to capacity, no precise and distinct line can be drawn. Suffice it to say, that the influence exercised must be an unlawful importunity, on account of the manner or motive of its exertion, and by reason of which the testator's mind was so embarrassed and restrained in its operation that he was not master of his own opinions in respect to the disposition of his estate": *Potts v. House*, 6 Ga. 324, 359; 50 Am. Dec. 329. "The testator should enjoy full liberty and freedom in the making of his will, and possess the power to withstand all direction and control. That degree, therefore, of importunity or undue influence which deprives the testator of his free agency, if it is such as he is too weak to resist, and will render the instrument not his free and unrestrained act, is sufficient to invalidate it": *Davis v. Calvert*, 5 Gill & J. 269; 25 Am. Dec. 282; *Wampler v. Wampler*, 9 Md. 540; *Grove v. Spiker*, 72 Md. 300; *Maynard v. Vinton*, 59 Mich. 139; 60 Am. Rep. 276; *Latham v. Schaal*, 25 Neb. 535. "What constitutes undue influence can never be precisely defined. It must necessarily depend, in each case, on the means of coercion or influence possessed by one party over the other; upon the power, authority, or control of the one, the age, the sex, the temper, the mental and physical condition, and the dependence of the other. Whatever destroys the free agency of the testator constitutes undue influence. Whether that object be effected by physical force or mental coercion, by threats which occasion fear, or by importunity which the testator is too weak to resist, or which extorts compliance in the hope of peace, is immaterial. In considering the question of undue influence, therefore, it becomes essential to ascertain, as far as practicable, the power of coercion upon the one hand, the liability to its influence upon the other": *Moore's Heirs v. Blauvelt*, 15 N. J. Eq. 368; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Marshall v. Flinn*, 4 Jones, 199. "A learned text-writer on wills deduces the following rules or principles from adjudged cases, and that the influence to avoid a will must be such as, — 1. To destroy the freedom of the testator's will, and thus render his act obviously more the offspring of the will of others than his own; 2. That it must be an influence specially directed towards the object of procuring a will in favor of particular parties; 3. If any degree of free agency or capacity remained in the testator, so that, when left to himself, he was capable of making a valid will, then the influence which so controls him as to render his making a will of no effect must be such as was intended to mislead him to the extent of making a will essentially contrary to his duty; and it must have proved successful, to some extent": *Gardiner v. Gardiner*, 34 N. Y. 161; citing *Redfield on Wills*, 524. "Undue influence is very nearly allied to fraud, yet they are not identical; whilst undue influence comprehends fraud, fraud does not embrace every species of undue influence. Undue influence exists where-

ever, through weakness, ignorance, dependence, or implicit reliance of one on the good faith of another, the latter obtains an ascendancy which prevents the former from exercising an unbiased judgment. To affect a will, it must, in a measure at least, destroy free agency, and operate on the mind of the testator at the time of making the will": *Herster v. Herster*, 122 Pa. St. 239; 9 Am. St. Rep. 95. "To make a good will, a man must be a free agent. But all influences are not unlawful. Persuasions, appeals to the affection or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, — these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure, of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist; moral command asserted, and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, — these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, but not driven; but his will must be the offspring of his own volition, and not the record of some one else's": *Hall v. Hall*, L. R. 1 Pro. & D. 481; *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712.

The means employed and the persons using them are immaterial, provided the result is undue influence. While the influence is usually exerted by some person directly or indirectly benefited by the will as it is finally executed, yet the effect upon the will is precisely the same, where the person influencing the testator receives no personal or other benefit from what he does: *In re Cahill*, 74 Cal. 52. So as to the means employed. They may be any of the infinite methods and forces by which one mind may obtain an ascendancy over another, so that what it did emanates from the former, and not from the latter: *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712; *Carroll v. Hause*, 48 N. J. Eq. 269; 27 Am. St. Rep. 469. In England, however, it has been held that every undue influence which may vitiate a will must be in the nature of coercion or of fraud. Thus the lord chancellor, in *Boyes v. Rossborough*, 6 H. L. Cas. 2, 3 Jur., N. S., 373, said: "The difficulty of deciding such a question arises from the difficulty of defining with distinctness what is undue influence. In a popular sense we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if, in these circumstances, the young man, influenced by his regard for the person who has thus led him astray, were to make a will, and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man so to dispose of his property, provided only that in making such a will the young man was really carrying into effect his own intention, formed without either coercion or fraud. I must further remark, that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion are greatly

enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes it as difficult to inquire as it would be impolitic to permit inquiry into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish; and this is the case with which your lordships have now to deal. In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words, some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used, or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror, and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion. So as to fraud. If a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed, such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive. It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say that, allowing a fair latitude of construction, they must range themselves under one or other of these heads, — coercion or fraud."

Free Agency must be Destroyed. — The theory upon which a will is set aside for undue influence is, that though it is in form the will of the testator, it is in fact the will of some other person. Hence, whatever may have been the influence exerted or attempted to be exerted by another, it cannot vitiate a will, unless in fact it overcame the will of the testator, so that, to some extent at least, he was not, in executing the will, a free agent. "Undue influence, such as will invalidate a will, must be something which destroys the free agency of the testator at the time when the instrument is made, and which in fact substitutes the will of another for that of the testator. It may be exercised through threats, fraud, importunity, or by the silent, resistless power which the strong often exercise over the weak and infirm; but, however exercised, it must, in order to avoid the will, destroy the free agency of the testator at the time it was made, so that the instrument, in effect, expresses the mind and intent of some one else, and not his own": *Schmidt v. Schmidt*, 47 Minn. 451. As undue influence consists of the overcoming of the will of another, so as to produce a testamentary disposition of his property, it is manifest that it is rarely possible to determine whether such an influence has been exerted without taking into consideration the character and circumstances of the testator. Too many wills are executed after the testator has become enfeebled in mind or body, or both, by age or disease, and when he is more susceptible to the influence of others, and less able to resist their importunity or coercion than a person of robust health, in the maturity of his intellectual powers. Still, the law permits persons of extreme age, or those in the presence of impending death, and while tortured and enfeebled

by the progress of painful and fatal maladies, to dispose of their property by will. In this case, as well as in all others, the only question, when testamentary capacity exists, is, though the influence of others was brought to bear upon the testator, Was he able to resist such influence? and if the influence were removed, would it still receive his assent? If so, it is his will, and must be respected as such. But neither importunity, nor threats, nor persuasion, nor any other of the manifold forms in which influence may be brought to bear, can vitiate the will, if the testator was able to properly weigh or resist them, and ultimately made a disposition of his property which was the result of his mind and will, and not of the will of another: *Tobias v. Jenkins*, 29 Ark. 151; *Leeper v. Taylor*, 47 Ala. 221; *Tyson v. Tyson*, 37 Md. 567; *Brick v. Brick*, 68 N. Y. 144; *Barnes v. Barnes*, 66 Mo. 286; *Marz v. McGlynn*, 88 N. Y. 357; *Gardner v. Gardner*, 22 Wend. 526; 34 Am. Dec. 340; *Lowe v. Williamson*, 2 N. J. Eq. 82; *Small v. Small*, 4 Greenl. 223; 16 Am. Dec. 253; *Baldwin v. Parker*, 99 Mass. 79; 96 Am. Dec. 697; *Floyd v. Floyd*, 3 Strobl. 44; 49 Am. Dec. 626; *McCulloch v. Campbell*, 49 Ark. 367; *Waddington v. Bushy*, 45 N. J. Eq. 173; 14 Am. St. Rep. 706; *Allmon v. Pigg*, 82 Ill. 149; 25 Am. Rep. 303; *Taylor v. Kelly*, 31 Ala. 59; 68 Am. Dec. 150; *Latham v. Udell*, 38 Mich. 238; *Layman v. Conrey*, 60 Md. 286; *Stuts v. Schaeffle*, 16 Jur. 909; *Williams v. Goude*, 1 Hagg. Ecc. 577; *Forney v. Ferrell*, 4 W. Va. 729. Upon this subject the vice-chancellor of New Jersey, in *Haydock v. Haydock*, 33 N. J. Eq. 494, pertinently and forcibly said: "The determination of this question must always be largely controlled by the state of health and condition of mind of the person alleged to have been unduly or unfairly influenced. A mind naturally weak, and which has become impaired by age, disease, or grief is much more subject to any sort of control than one naturally strong and unimpaired. It is always, therefore, a matter of the first importance to the tribunal charged with the duty of deciding this question to know fully the situation and surroundings and the exact condition of mind and state of physical health of the person alleged to have been imposed upon. No definition of what the law denominates undue influence can be given which will furnish a safe and reliable test for every case. Each case must be decided on its own special facts. All that can be said in the way of formulating a general rule on that subject is, that whatever destroys free agency, and constrains the person whose act is brought into judgment to do what is against his will, and what he would not have done if left to himself, is undue influence, whether the control be exercised by physical force, threats, importunity, or any other species of mental or physical coercion. The extent or degree of the influence is quite immaterial; for the test always is, Was the influence, whether slight or powerful, sufficient to destroy free agency, so that the act put in judgment was the result of the domination of the mind of another, rather than the expression of the will and mind of the actor? *Turner v. Cheesman*, 15 N. J. Eq. 243, 265; *Moore's Ex'rs v. Blauvelt*, 15 N. J. Eq. 367; *Lynch v. Clements*, 24 N. J. Eq. 431."

Must be Directed towards the Execution of the Will. — The general declaration is frequently made, that the undue influence which will vitiate a will must be specially directed towards that object; that it must be exercised with a view to procuring a will to be made in harmony with it: *McCulloch v. Campbell*, 49 Ark. 367; *Allmon v. Pigg*, 82 Ill. 149; 25 Am. Rep. 303; *Roe v. Taylor*, 45 Ill. 491; *Brownfield v. Brownfield*, 43 Ill. 155; *Rutherford v. Morris*, 77 Ill. 397. We are not sure that this is always true. Doubtless, it would not be sufficient, to destroy a will, to prove that certain persons exercised a great and even an undue influence over the testator in many respects,

if it was clear that such influence was not exerted with respect to the will, and that the latter was entirely free of it. There may perhaps be instances in which persons exercise an influence over a testator to the extent of preventing him from disposing of his property as he otherwise would, without their knowing or caring whether that result was produced or not, as where, by misrepresentation or other means, a prejudice is generated against relatives, or devisees, or legatees, causing them to be disinherited or deprived of the benefits of a pre-existing will. If, in such a case, the mind and will of the testator were so influenced that he revoked his will, we doubt whether the effect of the undue influence upon the new will executed under its domination can be obliterated by proving that it was exercised for some other object than of producing the will which actually resulted from it.

Must Affect the Will.—It is true, beyond question, that no influence can vitiate a will which it did not affect. It is not material that the influence be exercised on the day or hour that the will was made, provided it was at that time a continuing influence: *Taylor v. Wilburn*, 20 Mo. 306; 64 Am. Dec. 186; *Davis v. Calvert*, 5 Gill & J. 269; 25 Am. Dec. 282; *Hartman v. Strickler*, 82 Va. 225. Though an influence, undue and unlawful, was exerted over a testator, yet if it at no time affected or overcame his will, or if, though dominating his will at the time, its potency had ceased, so that when he came to make the will in question it was a correct expression of his desires, then the influence, because it has been harmless, should not be taken into consideration: *Monroe v. Barclay*, 17 Ohio St. 313; 93 Am. Dec. 620; *McKert v. Flourey*, 43 Pa. St. 46; *McMahon v. Ryan*, 20 Pa. St. 329; *Harvey v. Sullens*, 46 Mo. 147; 2 Am. Rep. 491; *Morris v. Stokes*, 21 Ga. 552; *Children's Aid Society v. Loveridge*, 70 N. Y. 387; *McCulloch v. Campbell*, 49 Ark. 367; *Jencks v. Court of Probate*, 2 R. L. 255; *Batton v. Watson*, 13 Ga. 63; 58 Am. Dec. 504.

Whether the Influence must be Unlawful.—That an influence, to be undue, must be unlawful, is often asserted: *Means v. Means*, 5 Strob. 167. In other cases it is said that the influence must be fraudulent and controlling: *Wright v. Howe*, 7 Jones, 412; and must be intended to mislead the testator "to the extent of making a will essentially contrary to his duty": *Jackman's Will*, 26 Wis. 104, 112; *Gardiner v. Gardiner*, 34 N. Y. 155. That an undue influence is often unlawful and fraudulent is no doubt true, and that fraud, where it results in undue influence, is fatal to a will, is equally beyond dispute: *Seguine v. Seguine*, 4 Abb. App. 191; *Terry v. Buffington*, 11 Ga. 337; 56 Am. Dec. 423. But we apprehend that it is not essential that an influence be either unlawful or fraudulent, unless it be true, as a matter of law, that every influence which deprives the testator of his free agency, and procures him to execute a will which is the will of another person, and not of himself, is fraudulent and unlawful: *Stewart v. Elliott*, 2 Mackey, 307; *Davis v. Calvert*, 5 Gill & J. 269; 25 Am. Dec. 282. Nor can we understand how any inquiry can be entertained for the purpose of determining whether a will was "essentially contrary to the testator's duty," unless, perhaps, when the fact that the will is an unnatural one is considered in connection with other circumstances, tending to prove that undue influence was exercised over him, and that he was unable to resist it. Surely, if the existence of an influence which overcame the testator's freedom of action is established, the will cannot be supported by proving that the testator wished and intended to make a will contrary to his duty, and that the influence was imposed only for the purpose of thwarting his evil design, and compelling him to do right, though it was his will to do wrong. If it be true

that an influence, to be undue, must, as many of the authorities declare, "be exerted *mala fide*, to produce a result which the party as a reasonable person was bound to know was unreasonable and unjust": *Redfield on Wills*, 527; *Juckman's Will*, 26 Wis. 114; *Woodward v. James*, 3 Strob. 552; 51 Am. Rep. 649; then, though the will in question was never freely assented to by the testator, it must be upheld, if it ought to have been assented to, and the fraud, force, deception, or coercion practiced upon and against him were employed in a worthy cause, or in favor of good or meritorious beneficiaries.

Influences Which are not Improper. — Of course, every intelligent devise or bequest is the result of some influence operating upon the mind and will of the testator, and in nearly every instance in which a testamentary disposition differs from that which the law itself would make of the testator's property, such disposition is the result of some influence exercised by some other person or persons, whether intentionally or consciously or not, over the testator. The vast majority of these influences are not undue, though but for them the testator would probably or certainly have made a different will.

Influences of Kinship or Companionship. — The most obvious and universal influences are those of kinship, of marriage, and of personal and social relations, and the testator who merely yields to them cannot be said to be unduly influenced, though he fails to provide for some or all of the natural objects of his bounty. Thus it has been said, without peril of successful contradiction, that an influence obtained by a wife through her fidelity and her virtue cannot possibly be undue: *Small v. Small*, 4 Greenl. 220; 16 Am. Dec. 253. This must be equally true of the other members of the testator's family, and if their demeanor towards him, or even the fact of their being constantly in his presence, engenders affection upon his part towards them, culminating in his preferring them in his will to others equally bound to him by the ties of consanguinity, this influence, though it has resulted to their advantage, is not undue: *Thompson v. Ish*, 99 Mo. 160; 17 Am. St. Rep. 552; *McGulloch v. Campbell*, 49 Ark. 367; *Elliott's Will*, 2 J. J. Marsh. 340; *Dean v. Negley*, 41 Pa. St. 312; 80 Am. Dec. 620. Companionship with persons met at all related to the testator may produce the same effect, and if so, his will in their favor cannot for that reason be avoided: *Sechrest v. Edwards*, 4 Met. (Ky.) 163; *Higgins v. Carleton*, 28 Md. 115; 92 Am. Dec. 686; *Floyd v. Floyd*, 3 Strob. 44; 49 Am. Dec. 626.

The Influences of Kind Offices or of Good Deeds are certainly legitimate, and a will cannot be avoided because produced by them: *Trumbull v. Gibbons*, 23 N. J. L. 117; 51 Am. Dec. 255; *Kerr v. Lunaford*, 31 W. Va. 680; *Williams's Estate*, 13 Phila. 302. If a will is but a recognition and reward of kind offices, there is no doubt that their influence cannot be regarded as undue. In many instances it may be insisted that while these offices have existed, and were entitled to recognition and recompense, yet that an undue ascendancy was, through them, obtained over the testator, and was exercised to the extent of overcoming his will, and obtaining a testamentary disposition which, under the circumstances in which he was placed by his benefactors, he was unable to deny. So, too, it may be urged that those offices were not incited by friendship or benevolence, but were part of a scheme devised for the purpose of weaning the testator away from his friends and kindred, and procuring a will in which their claims should be sacrificed in favor of those who, from selfish motives, had obtained possession of his person, and ministered to his wants or his whims, in his old age or in his last illness. Doubtless there may be instances in which the caring for a person in his declining years may be regarded with suspicion, and, in connection with other evi-

dence, may justify a finding of undue influence, but in the absence of such other evidence, this can rarely or never be so. To hold otherwise would be to discourage "that affectionate care and attention which the law upholds, rather than condemns": *Bush v. Lisk*, 89 Ky. 393; *White v. Starr*, 47 N. J. Eq. 244.

The Influence of Illicit Relations. — The social ties and kind offices of which we have hitherto spoken do not include relations or offices of an unlawful or immoral character, though it is by no means certain that the principles applicable to moral and praiseworthy relations are not equally applicable to those of a meretricious nature, provided it be clear that the testator retained his self-control, and his bounty was the result either of his affection or his pity. In a case arising in South Carolina, a will was sought to be set aside on the ground that a beneficiary was a woman of African descent with whom the testator had lived in disgraceful intimacy, and that she had interposed her influence in favor of another beneficiary. There being, however, no evidence that anything had been done to interfere with the free agency of the testator, the court said: "Not merely in the ordinary affairs of life, but in the disposition of his property, even the sternest man is sometimes influenced by the wishes of a friend, a wife, or even an unworthy mistress, who has usurped, both in his affections and at his table, the place of his lawful wife. It has happened, and will happen again, that a mistress may so captivate the affections of her paramour, that he shall give her his whole estate, to the exclusion of his lawful wife and children. Such an act all would condemn, and concur in denouncing as immoral and improper the influence which had produced it; but if it be done under the influence of affection merely, however unworthy the object may be, such wills have been, and must be, supported, so long as the law allows a man to dispose of the property according to his own wishes. It has never been supposed to be essential to a will or deed that the motive which led to the act should be virtuous, or that the object of the donor's bounty should be meritorious, but it is essential that it should be the free and voluntary act of a sane mind. If, in making it, he has been influenced by modest persuasion, by arguments addressed to his understanding, or by appeals to affection merely, the act is a valid one. If it be in conformity to his wishes, it is emphatically his will, and not the will of another, and we are bound to give it effect, without reference to the motive of the testator, or the unworthiness of the legatee, until the legislature, upon considerations of public policy, shall think proper further to abridge the right of an owner to dispose of his property": *O'Neill v. Farr*, 1 Rich. 80, 83; *Farr v. Thompson*, 1 Cheves, 37; *Monroe v. Barclay*, 17 Ohio St. 302; 93 Am. Dec. 620. As long as the absolute power of testamentary disposition is conceded, and the owner of property is allowed to dispose of it to whomsoever he pleases, and for such reasons as to him shall seem adequate, his right to make a bequest to one with whom his relations have been meretricious must be admitted, even though it be further conceded that the bequest was made because of those relations. Nor can the existence of those relations create a presumption of undue influence, and impose upon the beneficiary the burden of disproving the exercise of such influence: *In re Mondorf*, 110 N. Y. 450; *Wainwright's Appeal*, 89 Pa. St. 220; *Roe v. Taylor*, 45 Ill. 485; *McClure v. McClure*, 86 Tenn. 178; *Rudy v. Ulrich*, 69 Pa. St. 177; 8 Am. Rep. 238; *Porschel v. Porschel*, 82 Ky. 93; 56 Am. Rep. 880. Nevertheless, it is true that when undue influence is charged, the fact that the person accused of exercising it lived in illicit relations with the testator or testatrix may prop-

erly be admitted in evidence, to be considered by the jury, in connection with circumstances tending to prove undue influence: *Main v. Ryder*, 84 Pa. St. 217; *Davis v. Calvert*, 5 Gill & J. 269; 35 Am. Dec. 232; *McClure v. McClure*, 86 Tenn. 173; and it is probably true, in some states at least, that acts and conduct of a mistress may amount to undue influence when that effect would not be attributed to like acts or conduct on the part of a wife: *McClure v. McClure*, 86 Tenn. 173; *Dean v. Negley*, 41 Pa. St. 312; 80 Am. Dec. 620. Thus in one case the court said: "We are of the opinion that there is a difference in the two cases, and that an influence when exercised by a wife might be lawful and legitimate, but which, if exercised by a woman occupying an adulterous relation to the testator, might be undue and illegitimate": *Kessinger v. Kessinger*, 37 Ind. 341. Possibly this is true; but no court has as yet pointed out any influence exercised by a wife to the extent of destroying the husband's free agency which will not vitiate his will, nor any influence of a mistress, leaving the testator free to exercise such agency, which will vitiate such will. Perhaps all that can be affirmed upon this subject with any degree of confidence is, that in the practical administration of the law both courts and juries, from their aversion to a mistress and their sympathy for a wife, will resolve all doubtful questions against the former and in favor of the latter, and thus it will occur that evidence sufficient to produce the conviction of the undue influence of the former will not accomplish that result if offered against the latter.

Argument, Persuasion, Importunity. — It is not influence over the testator, but undue influence, which may vitiate his will. It is not essential that his will be suggested wholly by himself, nor that, as ultimately executed, it be of the same purport as if no one had made any suggestion to him concerning it, or used argument, persuasion, or even earnest entreaty, with a view of affecting its provisions. These are not unlawful, and, though often indelicate, are not improper, provided the testator's mental and physical condition, and the circumstances under which he is placed, are such that he may deliberate upon and either grant or deny them, through the untrammelled operation of his own mind and will. Thus a suggestion to a testator that particular dispositions of his property would be just to the natural objects of his bounty: *Blunkton v. Brick*, 44 N. J. Eq. 154; or even a suggestion resulting in a legacy which otherwise might not have been made, do not of themselves support a charge of undue influence: *Lyons v. Campbell*, 88 Ala. 462; *Thornton v. Thornton*, 39 Vt. 122. There can be no doubt of the right of a wife not only to counsel with her husband respecting his will, but even to employ argument and entreaty for the purpose of affecting its provisions. That she urged upon him the propriety of leaving all his property to her, and that he acted accordingly, does not establish undue influence: *Hughes v. Murtha*, 32 N. J. Eq. 288. In many instances, what he is about to dispose of is the result of the labors of her lifetime as well as of his, and while the law, perhaps unwisely as well as unjustly, may give her no absolute right to control the disposition, yet it will not regard as improper any influence which she may exercise over him, short of coercion, or the substitution of her will for his. "We do not know of any rule of law or morals which makes it unlawful or improper for a wife to use her wifely influence for her own benefit, or for that of others, unless she acts fraudulently or extorts benefits from her husband when he is not in a condition to exercise his faculties as a free agent. A faithful wife ought to have a very great influence over her husband, and it is one of the necessary results of proper marriage relations. It would be monstrous to deny to a woman, who is usually an

important agent in building up domestic prosperity, the right to express her wishes concerning its disposal. And there is no legal presumption against the validity of any provision which a husband may make in his wife's favor": *Latham v. Udell*, 38 Mich. 238, 240; *Pierce v. Pierce*, 38 Mich. 412; *Morris v. Brough*, 16 Serg. & R. 403; *Pingree v. Jones*, 80 Ill. 177; *Lide v. Lide*, 2 Brev. 403. While the right of children may not stand on the same high footing as that of a wife to be heard respecting a will, still there is no doubt that they have the right to influence their parent by fair argument, or even by entreaty, to make disposition of his property in their favor: *Elliot's Will*, 2 J. J. Marsh. 340; *Miller v. Miller*, 3 Serg. & R. 267; 8 Am. Dec. 651; *Gilreath v. Gilreath*, 4 Jones Eq. 142. In truth, as the only question is whether or not the testator's free agency was destroyed, it is not material whence argument or even entreaty came, provided it left such agency untrammelled. The appeal may be to his affections, or his sense of gratitude for past services, or his sense of compassion for the destitution and want which may overcome the applicant in the future, unless some provision is made for him in the will: *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712; *Hall v. Hall*, L. R. 1 Pro. & D. 481; *Harrison's Will*, 1 B. Mon. 351. So long as no fraud is practiced upon the testator, and no advantage taken of his weakness and his inability to resist, his bounty may be sought by every appeal to his intelligence or his emotions, which may lawfully influence his judgment or his affections. He may be flattered, persuaded, or entreated: *McDaniel v. Crosby*, 19 Ark. 533; *Yoe v. McCord*, 74 Ill. 33; *Schofield v. Walker*, 58 Mich. 96; *Maynard v. Vinton*, 59 Mich. 139; 60 Am. Rep. 276; *Miller v. Miller*, 3 Serg. & R. 266; 8 Am. Dec. 651; *Hoge's Estate*, 2 Brewst. 450. The importunity may be such as no delicate mind could be guilty of: *Tawney v. Long*, 76 Pa. St. 106; and yet if he yield intelligently, and from conviction, the influence thus operating is not undue: *St. Leger's Appeal*, 34 Conn. 434; 91 Am. Dec. 735; *Gilbert v. Gilbert*, 22 Ala. 529; 58 Am. Dec. 268. "Solicitations, however importunate, cannot of themselves constitute undue influence, for, though these may have a constraining effect, they do not destroy the testator's power to freely dispose of his estate": *Trust v. Dingler*, 118 Pa. St. 259; 4 Am. St. Rep. 593. In other words, while importunity is one of the means of obtaining and exercising undue influence, yet such influence does not always nor usually result, and, as already suggested, it is not the means employed, but the result accomplished, which vitiates a will. If the condition of the testator is such that he cannot resist the importunity, then whatever is obtained by it is the fruit of undue influence: *Elkinton v. Brick*, 44 N. J. Eq. 154. "Influence obtained by flattery, importunity, threats, superiority of will, mind, or character, or by what art soever that human thought, ingenuity, or cunning may employ, which would give dominion over the will of the testator to such an extent as to destroy free agency, or constrain him to do what is against his will, what he is unable to resist, is such an influence as the law condemns as undue, when exercised by any one immediately over the testamentary act, whether by direction or indirection, or obtained at one time or another": *Wise v. Foote*, 81 Ky. 10; *Schofield v. Walker*, 58 Mich. 96; *Rabb v. Graham*, 43 Ind. 1; *Kinleside v. Harrison*, 2 Phill. 551; *Sutton v. Sutton*, 5 Harr. (Del.) 459; *McDaniel v. Crosby*, 19 Ark. 533. Whenever we have spoken of argument, persuasion, or entreaty as not constituting undue influence, provided the free agency of the testator was not impaired by them, we have meant honest argument or persuasion, and not that which accomplished its result by resorting to fraud or falsehood. The effect of fraud and falsehood has not been so carefully con-

sidered by the courts as its importance deserves. It is not at all difficult to imagine a case in which a will expressed with perfect accuracy the wishes of the testator at the time it was made, so that it is impossible to say of it that the testator did not, in making it, act as a free agent, and yet his wishes as so expressed were produced by the artifices of another in creating in the mind of the testator a false belief as to the merits or demerits or the necessities of the objects of his bounty; and we apprehend that whenever a testator is controlled in making his will by a misrepresentation, whether expressed or implied, provided it be conscious and intentional, then such influence is undue, and the party guilty of it, or in whose behalf it was exercised by another, will not be permitted to take advantage of it: *In re Budlong's Will*, 126 N. Y. 423, 432; *Tyler v. Gardiner*, 35 N. Y. 559, 576, 593.

Prejudices and Aversions share with affections and preferences in producing the convictions and impulses under which wills are made, and the influences of the former are not necessarily undue, any more than are those of the latter, though they more often indicate an unbalanced mind or want of testamentary capacity, or the operation of malign artifices. The fact that the testator was prejudiced against or had an aversion for some of the natural objects of his bounty, and therefore disinherited them in favor of others, whether related to him or not, does not establish undue influence, though the will is clearly the fruit of his resentment and dislike: *Nicholas v. Kerchner*, 20 W. Va. 256; *Kerr v. Lunsford*, 31 W. Va. 659; *Carter v. Dixon*, 69 Ga. 82. Nor, when family dissensions arise, will the fact that a child not only shared in the feelings of his parent respecting the conduct of another child, and perhaps kept alive and increased the parental resentment, constitute undue influence vitiating a will in favor of the former and against the latter: *Woodward v. James*, 3 Strob. 552; 51 Am. Dec. 649.

Improper Influences. — All influences which are undue are improper, if by undue is meant the domination of the will of the testator to the extent of destroying his free agency; but whether an improper influence is also undue must depend upon its effect upon the will in question. We shall now speak of some influences of a character so obviously improper, and so likely to result in undue influence, that we apprehend it must, in many cases, be presumed from their existence, in the absence of all evidence tending to prove that the testator successfully resisted them. The chief among these influences is that of fear generated in the mind of an aged, feeble, or dependent person by one in whose power he is. Thus if it appears that a son has abused his aged father, who resides with him, even to the extent of threatening him with personal chastisement, and that the latter manifestly lived in fear that these threats might be executed, but nevertheless made his will in favor of such son, contrary to his previously expressed intentions, undue influence should be presumed: *Hartman v. Strickler*, 82 Va. 225. Nor need the fear be of personal violence; it may result from a threat that family discord and litigation will ensue. "Threats of personal estrangement and non-intercourse addressed by children to a dependent parent, or threats of litigation between children to influence a testamentary disposition of property by a parent, constitute undue influence": *Moore v. Blauvelt*, 15 N. J. Eq. 367.

Misrepresentation and Like Artifices. — The most potent influence which can be exercised over the testamentary disposition of property is to give the testator a false impression concerning persons in whose favor his bounty is sought, or against persons who may be disinherited by the exertion of his testamentary powers. The necessities and the claims upon his affection of different persons who are the natural objects of his bounty may be expressly or impliedly misrep-

resented, so that when he comes to make his will he acts upon unfounded beliefs, and gives or withholds his bounty in a manner entirely different from what his action would have been had it not been based upon beliefs and opinions deliberately instilled into his mind for the purpose of influencing his will. We have already expressed our regret that the adjudged cases have not more distinctly considered the effect of misrepresentation and fraud employed, not for the purpose of destroying the free agency of the testator, but for the purpose of causing such agency to be exercised upon what may, for want of a better expression, be styled false premises. Of course, a misrepresentation that does not influence a will cannot vitiate it: *Taylor v. Kelly*, 31 Ala. 59; 68 Am. Dec. 150; and the fact that the beneficiary of a will has, in the presence of the testator, denounced one who is discriminated against by it does not establish undue influence, when the testator was under no restraint, and, being in the full maturity of his powers, was competent to determine for himself whether the denunciation was merited or not: *Dumont v. Dumont*, 46 N. J. Eq. 223. But a testator may not be in a position to judge for himself, either because from age or illness his mind and will can no longer deliberate or resist, or because the true facts are sedulously concealed. We apprehend whenever it can be shown that by intentional misrepresentation, expressed or implied, or by a course of treatment or concealment, that the testator has been led to disinherit an heir, or to revoke a devise or bequest because of his belief that such heir or beneficiary has become or is unworthy of his bounty, or that some other person is more worthy of it, then such misrepresentation, if exercised by or on behalf of the person in whose favor the testamentary disposition is finally secured, is an undue influence, for which the will must be set aside: *Tyler v. Gardiner*, 35 N. Y. 559, 576, 593; *In re Budlong's Will*, 126 N. Y. 423. Hence where a testator who had contracted a second marriage, disinherited the children of his first marriage, it was held that evidence should be received, giving an insight into the private family life and history, for the purpose of disclosing what means, if any, his second wife had employed to alienate his affection from such children: *Newton v. Carberry*, 5 Cranch C. C. 632; *Reynolds v. Adams*, 90 Ill. 134; 32 Am. Rep. 15.

Burden of Proof, and Presumptions. — He who contests the admission to probate of a will, or seeks to set aside such probate after it has been granted, on the ground that the will was procured by undue influence, must assume the burden of proof, and establish to the satisfaction of the court or jury the existence of such influence, and that the will is one of its fruits: *Woodward v. James*, 3 Strob. 552; 51 Am. Dec. 649; *Baldwin v. Parker*, 99 Mass. 79; 96 Am. Dec. 697; *Rigg v. Wilton*, 13 Ill. 15; 54 Am. Dec. 419; *Webber v. Sullivan*, 58 Iowa, 260; *Davis v. Davis*, 123 Mass. 590; *Ewen v. Perrine*, 5 Redf. 640. And when the testator is shown to have been of sound mind, no presumption of the exercise of undue influence over him can be indulged, even though the will is, in the opinion of the court or jury, unreasonable and unjust, and such as ought not to have been made. At least, such is the rule supported by a majority of the cases upon this subject. The evidence may, however, show certain relations between the testator and the beneficiaries, well calculated to give them an undue influence over him, or that his condition of mind or body was such as to make it probable that he was not able to resist the influence of others, or that the provisions of the will are unnatural and unreasonable, and contrary alike to his duty and his previously expressed intentions, and this evidence, without any other, may often create a presumption of undue influence, and cast upon the proponent of the will the burden of removing such presumption. In the note to *Rich-*

mond's Appeal, 21 Am. St. Rep. 94-104, we so recently considered the presumptions of undue influence that we shall here attempt no more than a brief synopsis of the law upon the subject. As to the relations of the testator and a beneficiary of his will, it is sufficient to remark that the existence of undue influence may be presumed from them. — 1. When those relations are of such special trust and confidence as of themselves to warrant the presumption that they have an undue influence over him; and 2. When they were such as to place him in the power of the beneficiaries or their emissaries at a time when he was too weak, mentally or physically, to resist. Chief among the relations of the first class are those of guardian and ward, attorney and client, priest, or other spiritual adviser, and persons looking to him for advice. Thus if a ward makes a testamentary disposition in favor of his guardian or of members of the guardian's family, under such circumstances that undue influence may have been employed, the burden of proof must be assumed by those claiming under the will, and they must establish that it did not result from the undue influence of the guardian: *Meek v. Perry*, 36 Miss. 190; *Garvin v. Williams*, 44 Mo. 465; 100 Am. Dec. 314; *Bridwell v. Swank*, 84 Mo. 455; *Breed v. Pratt*, 18 Pick. 115, 117; *Seiter v. Stroud*, 1 Demarest, 264. So if the beneficiary was the attorney of the testator, undue influence is presumed, and this presumption will naturally be most potent when the testator was old and illiterate, or placed in such circumstances as not to have the advice of friends or relatives, and partly or wholly disinherits the natural objects of his bounty: *Post v. Mason*, 26 Hun, 157; 91 N. Y. 539; 43 Am. Rep. 689; *Grove v. Spiker*, 72 Md. 300; *Riddell v. Johnson*, 26 Gratt. 152; *St. Leger's Appeal*, 34 Conn. 434; 91 Am. Dec. 735; *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85. If the beneficiary is a priest, a spiritual adviser, or a spiritualistic medium, he must also show that he exercised no undue influence: *Connor v. Stanley*, 72 Cal. 556; 1 Am. St. Rep. 84; *Leighton v. Orr*, 44 Iowa, 679; *Lyon v. Horne*, L. R. 6 Eq. 655; *Nottige v. Prince*, 2 Giff. 246; *Greenwood v. Cline*, 7 Or. 17; *Thompson v. Hawks*, 14 Fed. Rep. 902; *Marz v. McGlynn*, 88 N. Y. 357. In the cases to which we have referred, the presumption of undue influence arises from the fact that the relations spoken of are necessarily those of implicit trust and confidence, in which the temptation and opportunity for abuse would be too great if the beneficiary were not required to make affirmative proof that he did not betray the confidence placed in him, nor so use his influence as to coerce or mislead the testator, or otherwise obtain an undue ascendancy over him. And whenever the reason of the rule exists, the presence and applicability of the rule itself may generally be affirmed. Hence though the relation is not one of those already named, yet if it is one of such special trust and confidence that the testator apparently trusted the beneficiary as a client trusts an attorney, a patient his physician, or a ward his guardian, the absence of undue influence must be disproved: *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85; *Moore v. Spier*, 80 Ala. 129; *Delafield v. Pariah*, 1 Redf. 1; *In re Walsh*, 1 Redf. 238; *Daniel v. Hill*, 52 Ala. 430; and this is more especially true when the relations of the testator and the confidential friend and adviser were such that undue influence could have been exercised without any direct evidence of such influence being possible: *Herster v. Herster*, 116 Pa. St. 612; *Waddington v. Bushy*, 43 N. J. Eq. 154; or the testator was feeble in mind or body, or in his dotage: *Waddington v. Bushy*, 43 N. J. Eq. 154; *Ray v. Ray*, 98 N. C. 566; or the will is in conflict with the intentions of the testator, as expressed in pre-existing wills or otherwise: *Wilson's Appeal*, 99 Pa. St. 545. The relation of members of the same family is ordinarily one

of extreme trust and confidence, and might very naturally lead to the presumption of undue influence, were it not for the fact that a testamentary disposition in favor of relatives by consanguinity is treated as natural and just. Though sometimes the effect of relationship has been regarded as a circumstance to be considered in connection with other evidence: *Gaither v. Gaither*, 20 Ga. 709; yet there has been no instance, so far as we are aware, in which undue influence has been presumed merely from the relation of parent and child, husband and wife, or any other relation, either of consanguinity or affinity: *Armstrong v. Armstrong*, 63 Wis. 162; *In re Martin*, 98 N. Y. 193; *Latham v. Udell*, 38 Mich. 238; *Rankin v. Rankin*, 61 Mo. 295; *Will of Nelson*, 39 Minn. 204; *Will of Andrews*, 33 N. J. Eq. 514. The fact that illicit relations existed between the testator and the beneficiary, and that they lived together as husband and wife, without being such, does not create any presumption of undue influence: *Post v. Mason*, 91 N. Y. 539; 43 Am. Rep. 689; *Sunderland v. Hood*, 84 Mo. 293; *Rudy v. Ulrich*, 69 Pa. St. 177; 8 Am. Rep. 238; *Wainwright's Appeal*, 89 Pa. St. 220; *Main v. Ryder*, 84 Pa. St. 217; *Porschet v. Porschet*, 82 Ky. 93; 56 Am. Rep. 880; *Monroe v. Barclay*, 17 Ohio St. 302; 93 Am. Dec. 620. If a will is drafted by one to whom, or to whose family, or some member thereof, a bequest or devise is made, this is sometimes regarded as a suspicious circumstance: *Edmonds v. Lever*, 11 Jur., N. S., 911. Perhaps it may require more clear and satisfactory evidence that the contents of the will were clearly disclosed to the testator, than if it were drawn by a disinterested person: *Beall v. Mann*, 5 Ga. 456; *Kelly v. Settegast*, 68 Tex. 13. However this may be, there is no presumption that it was procured by the undue influence of the draughtsman; though if there is other evidence of undue influence, then the fact that the will was prepared by an interested party may properly be considered by the court and jury as giving increased force and probability to such evidence: *Waddington v. Busby*, 45 N. J. Eq. 173; 14 Am. St. Rep. 706; *Carter v. Dixon*, 69 Ga. 82; *Coffin v. Coffin*, 23 N. Y. 9; 80 Am. Dec. 235; *Cheatham v. Hatcher*, 30 Gratt. 56; 32 Am. Rep. 650; *Post v. Mason*, 91 N. Y. 539; 43 Am. Rep. 689; *Montague v. Allan*, 78 Va. 592; 49 Am. Rep. 384; *Yardley v. Cuthbertson*, 108 Pa. St. 395; 56 Am. Rep. 218. In some cases in which it appeared that the wills in question had been prepared by or at the instance of persons interested in them, expressions were made from which an inference might be drawn not in harmony with the rule as we have just stated it, but on examination of these cases we think nothing is necessarily affirmed by them, except that "it should be shown that the testator clearly understood the contents of the paper which he signed": *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Kelly v. Settegast*, 68 Tex. 13. "While the mere fact that a will is written by a party who takes a benefit under it does not invalidate it, yet if the benefit is large, and especially if the beneficiary is a stranger to the testator's blood, the instrument will be scrutinized with suspicion, and clear proof that the testator knew its contents will be required to admit it to probate. Proof of testamentary capacity and of formal execution are insufficient. Because of its accuracy and guarded limitations, we quote the statement of the rule made by Baron Parke: 'If a party writes or prepares a will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased: *Barry v. Bullin*, 1 Curt. 637.' Evidence in the shape

of instructions for the preparation of the will, or reading or hearing it read, is the most satisfactory, but not the only precise species of evidence of the testator's knowledge of the will, — circumstantial evidence may be sufficient; but the party claiming under the will, whatever mode of proof he may adopt, must satisfactorily establish that the testator knew the contents; *onus probandi* is on him": *Lyons v. Campbell*, 88 Ala. 462.

The relations of the second class, to wit, those in which it appears that the testator was placed in the power or under the control of the beneficiary, or of his emissaries, to an extent which justifies the inference, in the absence of countervailing evidence, that he was subjected to undue influence, are of great variety, but all resemble in the fact that the circumstances of the testator were such that his acting freely and intelligently was less probable than his acting in obedience to the will of another. Thus if a will is made in favor of a hospital in which the testator was at the time lying *in extremis*, and is drawn by its chaplain, and ignores the natural heir, slight circumstances will justify the jury in inferring undue influence: *Muller v. St. Louis Hospital Ass'n*, 5 Mo. App. 390. In truth, probably the majority of the courts would require additional evidence in support of the will, especially if it disregards the claims of kindred or conflicts with a pre-existing will. If a testator is helpless, either from illness or old age, and is in the house of another, on whom he necessarily depends for care, comfort, and attention, the probability of his being subjected to influences which he cannot resist is very great. "The rule to be deduced from the decisions on the subject is this: that where a person, enfeebled by old age or illness, makes a will in favor of another person, upon whom he is dependent, and that will is at variance with a former will made or intentions formed when his faculties were in full vigor, and is opposed to the dictates of natural justice, the presumption is, that such a will is the result of undue influence, unless that presumption is satisfactorily rebutted by other evidence in the case": *Demmert v. Schnell*, 4 Redf. 409; *Carroll v. House*, 48 N. J. Eq. 269; 27 Am. St. Rep. 469; *Swenarton v. Hancock*, 22 Hun, 38; *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85. Generally, whenever it is shown that when the will was executed the testator was *in extremis*, or seriously ill, or that he was of weak mind, either from dissipation, age, or natural infirmity of intellect, it is incumbent upon those claiming under the will to show what were the circumstances under which it was executed, and to rebut the presumption of undue influence which must be drawn in the absence of any explanatory testimony: *Boyd v. Boyd*, 66 Pa. St. 233; *Moore v. Moore*, 56 Cal. 89; *Allore v. Jewell*, 94 U. S. 506; *Fishburne v. Ferguson*, 84 Va. 87; *Harvey v. Sullens*, 46 Mo. 147; 2 Am. Rep. 491.

Secrecy in the Execution of a Will is not necessarily a badge of fraud, nor does it create a presumption of undue influence: *Coffin v. Coffin*, 23 N. Y. 9; 80 Am. Dec. 235; *Gilbert v. Gilbert*, 22 Ala. 529; 58 Am. Dec. 268; *Brick v. Brick*, 43 N. J. Eq. 167; nor can such presumption arise from the fact that when the will was executed the testator was surrounded by those of his children who were principally benefited by it, and the child who was disinherited was absent: *Bundy v. McKnight*, 48 Ind. 502. The fact that the execution of a will was kept secret from some of the children and heirs of the testator is often entitled to great consideration, in connection with evidence tending to show undue influence. Thus where a testatrix was old and feeble, with a mind so impaired that she was easily influenced by those possessing her confidence, and her will was executed in the presence of one of her children, who was greatly benefited by it, the court regarded the secrecy of its

execution as a circumstance tending to establish undue influence; *Greenwood v. Cline*, 7 Or. 17. If it appears that devices were resorted to for the purpose of keeping the testator's relatives away from him, or for preventing their being present when the will was made and knowing about its execution, and those devices were sanctioned by the persons who were made beneficiaries under the will, to the exclusion of other relatives, undue influence may be presumed, especially if the testator was in a helpless condition, or his intellect was impaired; *Byard v. Conover*, 39 N. J. Eq. 244; *Greenwood v. Cline*, 7 Or. 18. What, for want of a better term, are often styled unnatural, arbitrary, and unreasonable provisions in a will are frequently spoken of as requiring explanation, or as raising a presumption of undue influence. But the law accords testators the right to make unnatural and unreasonable provisions, and it does not confer upon judges or juries authority to determine for a testator what will he shall make, nor to disregard his preferences as arbitrary or unjust. Nor has any judge claimed the existence of this power, or desired to exercise it. But when it is alleged that a will has been procured by fraud or undue influence, or was executed while the testator was not of a disposing mind, the fact that its provisions are not in harmony with the ordinary desires of a free and rational mind must always lead probability to the allegation. It may happen, too, that the evidence discloses what were the affections and wishes of the testator but a short time before the will was made, and if so, and nothing has apparently occurred to change them or destroy their force, and his testament is at variance with them, such variance is often so unaccountable that it calls for explanation, and if such explanation is wanting, justifies the inference that what he did was not the act of his free and disposing mind. If the testator was of sound mind and health, and free from all constraint, the mere preference of one relative to another, or the preference of persons to whom he was not in any way related over his kinsmen, does not necessarily show undue influence; *Kitchell v. Beach*, 35 N. J. Eq. 446; *Woodward v. James*, 3 Strob. 552; 51 Am. Dec. 649; *Coffin v. Coffin*, 23 N. Y. 9; 80 Am. Dec. 235; *Storer's Will*, 28 Minn. 9; *Hubbard v. Hubbard*, 7 Or. 42; *Turners v. Turners*, 35 N. J. Eq. 437; *Jencks v. Court of Probate*, 2 R. I. 255. An eminent writer has said that "where the will is unreasonable in its provisions, and inconsistent with the duties of the testator with reference to his property and family, this, of itself, will impose upon those claiming under the instrument the necessity of giving some reasonable explanation of the unnatural character of the will," and that "gross inequality in the dispositions of the instrument, where no reason for it is suggested, either in the will or otherwise, may change the burden, and require explanation, on the part of those who support the will, to induce the belief that it was the free and deliberate offspring of a rational, self-poised, and clearly disposing mind": 1 Redfield on Wills, 516, 537; and this language has been quoted with apparent approval in some of the decisions: *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712. Nevertheless, we think that it does not correctly state the law upon this subject, at least when there is evidence that the testator was of sound and disposing mind. It is rarely possible to know what were the reasons influencing a testator, and even when they are known, there is no test by which to determine whether they are arbitrary, unnatural, or unjust. With some persons the ties of kindred are strong, and with others weak, and it would be difficult to establish that the latter are less sane or more subject to undue influence than the former. In every case coming within our observation in which the supposed unnaturalness or unjustness of a devise or bequest has been given any weight, there

were other circumstances indicating either undue influence or a defect in testamentary capacity, such as fear, dependence, feeble health, old age, and the like, and whenever any of these circumstances is shown, then no doubt the character of the will may be taken into consideration for the purpose of determining whether or not the probable undue influence was not in fact effective: *Harrel v. Harrel*, 1 Duvall, 203. That the beneficiaries had an opportunity or a motive for exercising undue influence over the testator cannot create any presumption that they exercised it, and that it was effective in producing the will: *Turnure v. Turnure*, 35 N. J. Eq. 437; *Hubbard v. Hubbard*, 7 Or. 42. The exceptions to this rule arise out of cases, to which we have already referred, in which the established relations of the parties were such that the law presumes that the one had an undue ascendancy over the other, or where it is proved by direct evidence that such ascendancy existed, and the will is contrary to the wishes of the testator as revealed when he was not subject to such ascendancy: *Clark v. Fisher*, 1 Paige, 171; 19 Am. Dec. 402; *Lynch v. Clements*, 24 N. J. Eq. 431; *Banta v. Williams*, 6 Demarest, 84.

Evidence. — It is not possible to specify or describe all the evidence which may properly be received either to prove or disprove the existence of undue influence. Of course, every fact from which the inference might legitimately be drawn that such influence had or had not been exerted, or if exerted, that it had or had not been effective, is admissible, provided the time of its exertion is not so remote, either from the making of the will or from the death of the testator, that no effect can reasonably be attributed to it. On the one hand it may be conceded that it is not essential that the influence be employed at the time of the execution of the will, and on the other, that it must continue to be operative upon the mind and will of the testator when he executed his last testament, no matter when it was first exercised: *In re Shaw's Will*, 11 Phila. 51; *Davis v. Calvert*, 5 Gill & J. 269; 25 Am. Dec. 282; *Hartman v. Strickler*, 82 Va. 225; *Taylor v. Wilburn*, 20 Mo. 306; 64 Am. Dec. 186. In other words, if any fraud, coercion, misrepresentation, or other means of undue influence are exercised over the testator, it is not necessary to prove that they were so exercised at the time the will was executed, but the probability of their being effective or influential must ordinarily diminish with the lapse of time, and the time may be so remote as to justify the exclusion of the evidence, and hence it was decided that evidence of the relations, some eight or ten years before the making of the will, between the testator and the persons claimed to have influenced him was too remote to be taken into consideration: *Batchelder v. Batchelder*, 139 Mass. 1; *Horah v. Knox*, 87 N. C. 483. Though the supposed influence was exerted at or about the time of the making of the will, the fact that the testator lived for a long period afterwards, and did not change his will in any respect, is entitled to great consideration. If it be conceded that the will was executed under the domination of undue influence, there is some difference of opinion as to whether it may be ratified by mere lapse of time, or by his retaining it in his custody after the influence has ceased to be operative, without revoking it, or indicating in any way his desire to do so. If he should execute a codicil to it, attested in the same manner as an original will is required to be attested, there can be no doubt that this would be an effective ratification of the will, if the undue influence was no longer controlling: *O'Neill v. Farr*, 1 Rich. 80. In other cases it has been said, in general terms, that a ratification of a will after the undue influence was withdrawn, and when the testator was certainly a free agent, would destroy the vitiating effect of the influence

under which the will was originally executed, but the court did not explain whether, by ratification, it meant merely retention and acquiescence, or some expression of desire made and attested in the same form and with the same solemnity as the original will: *Taylor v. Kelly*, 31 Ala. 59; 68 Am. Dec. 150. On the other hand, the position has been taken that if a will was originally tainted with undue influence to the extent that it was not then operative, it was, in legal contemplation, not the will of the testator at all, and therefore that he still remained intestate, and must so continue, either until he executes another paper, and thereby ratifies the will by some writing attested so as to amount to a new will: *Lamb v. Girtman*, 26 Ga. 625; *Chaddick v. Haley*, 81 Tex. 617. Very rarely does it occur that a will is conceded to have been the fruit of undue influence. Even if it be clear that there was an attempt to exert such influence, yet there is always doubt whether or not it was effective; for the will, though it accords with the desires of those guilty of attempting to unduly influence the testator, may nevertheless correctly express his testamentary desires, and be the result of them, and not of any extraneous influence. If, after a will is executed, the testator lives for a considerable time in the possession of his mental faculties, and apparently free from all undue influence, the presumption that the will never was tainted by any undue influence becomes very strong, if not absolutely irresistible: *Irish v. Smith*, 8 Serg. & R. 573; 11 Am. Dec. 648; *Floyd v. Floyd*, 3 Stroh. 44; 49 Am. Dec. 626; *Kelly v. Theales*, 2 Ir. Ch. 510.

As to the Amount of Evidence required to support the allegation of undue influence, the decisions speak "a varied language." "In order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with the contrary hypothesis": *Boyes v. Roseborough*, 6 H. L. Cas. 51. "Undue influence will not be presumed, but must be proved either by direct affirmative evidence, or by an array of circumstances making an inference of its exercise absolutely irresistible": *Whelpley v. Loder*, 1 Demarest, 512. There is nothing in reason nor in the authorities to justify this extreme and emphatic language. The existence of undue influence must be proved by the persons attacking the will. The burden is on them, and they do not sufficiently support it by establishing motive, or opportunity, or even the existence of circumstances which are as consistent with undue influence as with its absence: *La Bau v. Vanderbilt*, 3 Redf. 384; *Boyes v. Roseborough*, 6 H. L. Cas. 2. "To invalidate a will on the ground of undue influence, there must be affirmative evidence of the facts from which such influence is to be inferred. It is not sufficient to show that the party benefited by the will had the motive or the opportunity to exert such influence; there must be evidence that he did exert it, and so control the actions of the testator, either by importunities which he could not resist, or by deception, fraud, or other improper means, that the instrument is not really the will of the testator": *Cudney v. Cudney*, 68 N. Y. 152; *Woodward v. James*, 3 Stroh. 552; 51 Am. Dec. 649. This affirmative evidence need not exclude every other hypothesis, nor satisfy the judge or jury beyond a reasonable doubt. It is sufficient that it preponderates over the evidence offered to rebut it. "The burden of proof being on those who attack a will on the ground of undue influence, it is not sufficient that they barely show that the circumstances of the will are consistent with the hypothesis of undue influence; for this would be but to create an equipoise in the testimony, and the onus being on the party at-

tacking the will, he must go a step further, and show by any suitable evidence the inconsistency between circumstances of the execution of the will, and its being executed without the interposition of undue influence": *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712. In fact, the question of the amount of evidence necessary to support the charge of undue influence must be determined by the jury, or the court sitting as the jury. The question is one of fact, and the jury may therefore properly reach the conclusion that the will is vitiated by undue influence, if any competent evidence is submitted to them tending to support that conclusion: *Monroe v. Barclay*, 17 Ohio St. 313; 93 Am. Dec. 620; *Dean v. Nagley*, 41 Pa. St. 312; 80 Am. Dec. 629. But the court ought not to submit the question, where the evidence is of so weak and inconclusive a character that any verdict based upon it must be set aside: *Herster v. Herster*, 122 Pa. St. 330; 9 Am. St. Rep. 93; *Murdy's Appeal*, 123 Pa. St. 464.

Inferred from Circumstances. — Evidence of undue influence is more often circumstantial than direct, and there is no doubt that circumstantial evidence is admissible, and that it is sufficient to support the allegation of undue influence: *Martin v. Martin*, 3 Abb. App. 192. The circumstances which are relied upon for this purpose must be such that the inference of undue influence may be legitimately and reasonably drawn from them, and it is not sufficient that they are consistent with the existence of such influence. Thus, for the purpose of establishing undue influence on the part of the testator's wife, it is not admissible to prove that in the ordinary affairs of life she exercised great control over him. Such control is not in itself inconsistent with her wifely position and duty; and if the fact of its existence established that it was undue, and was exercised over the testamentary act, the presumption of undue influence would be created from those happy marital relations in which there is the greatest probability that the testator was moved solely by his affection and his sense of justice: *Storer's Will*, 23 Minn. 9. It is generally proper to admit evidence tending to show the circumstances under which the will was made, and the relations of the testator to the beneficiary and others. For this purpose evidence may be received to prove who were the members of the testator's family, and what were the amount, situation, and character of his property. At least, such evidence must be proper when the other facts disclosed make it necessary to consider whether the will was that of a reasonable man acting without constraint: *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85. If the testator has contracted a second marriage, and has disinherited the children of his former marriage, and there is evidence to establish the undue influence of his second wife, it is competent to show that there was no reason for the exclusion of the children of his former marriage from the benefits of the will: *Mullen v. Helderman*, 87 N. C. 471; or that before the second marriage his relations with his children were kind and affectionate, but afterwards they were forbidden to enter his house, and that he was for a considerable time in feeble health, and under the apparent domination of his wife: *Reynolds v. Adams*, 90 Ill. 134; 32 Am. Rep. 15. "Upon the question of undue influence, we have no doubt the general condition and surroundings of the deceased, and his relations with his wife, — who is the only person supposed to have exercised any influence over him, — may be properly shown for any period which can reasonably be regarded as bearing on the act of the disposal of his property. But as the only important inquiry is concerning the pressure of undue influence at the very time of the will, the testimony, to show facts of an inferential nature, must be confined to what would be legitimately regarded as

his then present relations. No technical nicety as to a few days, or perhaps a few weeks, can be demanded. But certainly, so far as domestic relations have any pertinency whatever on such questions, it is quite clear that if such influence is to be inferred from them, the facts must be more readily shown by recent than by past relations, and the testimony of fresh events is less likely to be manufactured than that of transactions long past": *Pierce v. Pierce*, 38 Mich. 412. While in the case of a second marriage it is undoubtedly proper to receive sufficient evidence to show the relations between the testator and his second wife, and the other members of his family, for the purpose of assisting in reaching a correct conclusion as to her influence over him, and as to whether it has been exerted, and with success, for the purpose of unduly affecting his will, yet it is not proper to investigate old scandals antedating their marriage, with reference to his and her conduct before the marriage, and during the lifetime of his former spouse: *Webber v. Sullivan*, 58 Iowa, 260; *Pierce v. Pierce*, 38 Mich. 412. It is said that neither general good nor general bad treatment is evidence of undue influence: *McMahon v. Ryan*, 20 Pa. St. 329; *Tweney v. Long*, 76 Pa. St. 106. The latter part of the proposition seems unreasonable; for if fraud and coercion are, as it must be admitted, most potent means of undue influence, is it not more reasonable to believe in their presence and potency when the conduct of the accused is shown to have been harsh and cruel, than when it was characterized by kindness or even by indifference? If the testator wholly or partly disinherited some of his heirs, the inference that in doing so he was exercising his own free agency is more reasonable when some estrangement was known to exist. Hence, evidence of such estrangement is always admissible: *Mooney v. Olsen*, 22 Kan. 69; *Dale v. Dale*, 36 N. J. Eq. 269. Evidence that a recital in a will is false, it has been held, is not admissible to show undue influence. This cannot be true in all cases; for it often happens that an undue influence is acquired by a misrepresentation, and a false recital would, at least, be evidence of the testator's belief in, and his acting upon, the matters recited. When a beneficiary or other person alleged to have exercised an undue influence was present at the execution of the will, or procured it to be executed, and took possession of it, what he said and did is generally admissible as part of the *res geste*. Therefore it may be shown that he was officious; that he intermeddled with or hurried the execution of the will: *Gilbert v. Gilbert*, 22 Ala. 529; 58 Am. Dec. 268; *Hollingsworth's Will*, 58 Iowa, 526; or after causing it to be prepared, concealed it from the relatives: *Byard v. Conover*, 39 N. J. Eq. 244. When a testator of great wealth contracts a marriage in old age, or while seriously or mortally ill, and in such circumstances that the object of the other contracting person is obviously mercenary, and the will is made in harmony with that object, all these facts are proper evidence for the consideration of the court or jury, and but slight evidence of undue influence will justify the denial of the probate of the will: *Primmer v. Primmer*, 75 Iowa, 415; *Wisner v. Maupin*, 2 Baxt. 342; *Potter's Appeal*, 53 Mich. 106. The mere fact that the will in question differs materially from a pre-existing will is not evidence of undue influence: *Horn v. Pullman*, 72 N. Y. 269; *Booth v. Kitchen*, 3 Redf. 53; *Wood v. Bishop*, 1 Demarest, 512; *Ranbin v. Ranbin*, 61 Mo. 295; *Nelson's Will*, 39 Minn. 204. Such a will is doubtless admissible for the purpose of showing what the testator's feelings and intentions were at the time it was executed, and if undue influence was attempted to be exercised over him, might justly lead to the conclusion that it had been effective. On the other hand, in so far as a former will agrees with a later one, it tends to

establish a fixed purpose on the part of the testator, and to support the inference that what he did was not the result of undue influence: *Thompson v. Ish*, 99 Mo. 160; 17 Am. St. Rep. 552. The fact that a will was retained by the testator for a considerable time after its execution, while he was under no constraint, tends to rebut the claim that it was the fruit of undue influence; but this is not true if, during such time, he was too ill and his intellect was too weak to consider the propriety of revoking the will: *Irick v. Smith*, 8 Serg. & R. 573; 11 Am. Dec. 648.

In nearly every case in which the allegation of undue influence is made, it becomes necessary to consider the health of the testator, mentally and physically, at or about the time his will was executed, because, unless in exceptional circumstances, it is difficult to conceive of undue influence operating on a person of mental and physical vigor to the extent of destroying free agency. Not only is evidence always admissible to prove that the testator was weak in body or mind, or both, and therefore apparently not in a condition to resist, but where such weakness is satisfactorily established, evidence of undue influence may be treated as sufficient to justify the setting aside of the will, which, had it been employed against a person of vigorous mind and body, would have been scarcely worthy of consideration: *Edge v. Edge*, 38 N. J. Eq. 211; *Rolowayen v. Rolowayen*, 63 N. Y. 504; *Taylor v. Wilburn*, 20 Mo. 306; 64 Am. Dec. 186; *Martin v. Teague*, 2 Speers, 268; *Chandler v. Ferris*, 1 Harr. (Del.) 454; *Leverett v. Carlisle*, 19 Ala. 80; *Potts v. House*, 6 Ga. 324; 50 Am. Dec. 329; *Reichenbach v. Reichenbach*, 127 Pa. 84 564; *Hartman v. Strickler*, 82 Va. 225. Helplessness of mind and body may result from intoxication as well as from age and disease, and therefore it is competent to show that a testator executed his will while he was intoxicated: *In re Cunningham*, 52 Cal. 465.

The Declarations of a Testator are generally admissible on the trial of the issue of undue influence, and yet, when received, their reception is never for the purpose of proving that such influence was exercised. Hence a finding of fraud or undue influence must be supported by some other evidence than the statements of the testator; and if there is no evidence of an attempt to exercise such influence, his declarations should not be received: *Oudney v. Oudney*, 68 N. Y. 148; *La Bas v. Vanderbilt*, 3 Redf. 384; *Griffith v. Diefenderfer*, 50 Md. 466; *Barker v. Barker*, 36 N. J. Eq. 259; *Harring v. Allen*, 25 Mich. 505; *Storer's Will*, 28 Minn. 9; *Bush v. Bush*, 87 Mo. 480; *Rusling v. Rusling*, 35 N. J. Eq. 120; *Kitchell v. Beach*, 35 N. J. Eq. 446; *Hayes v. West*, 37 Ind. 21. But if there is evidence of the exercise of undue influence, then the subsequent declarations of the testator are admissible for the purpose of showing the condition of his mind and the effect which the influence had upon him: *Marr v. McGlynn*, 88 N. Y. 358; *Griffith v. Diefenderfer*, 50 Md. 466; *Parsons v. Parsons*, 66 Iowa, 754; *Barker v. Barker*, 36 N. J. Eq. 259; *Reel v. Reel*, 1 Hawks, 248; 9 Am. Dec. 632; *Bates v. Bates*, 27 Iowa, 110; 1 Am. Rep. 260. While the courts profess to admit evidence of this character solely for the purpose of ascertaining the condition of the testator's mind, and the effect of the undue influence upon him, it is manifest that, when once admitted, its effect cannot be restricted to this purpose. If it be true, as it undoubtedly is, that it is competent to prove that a testator said, after making his will, that he had not made it as he wanted to, that he had done wrong, but could not help it: *Dennis v. Weekes*, 51 Ga. 24; or that, when in the presence of the person charged with exercising the influence, he could not resist her, and that he did not know but she had deceived him into dis-inheriting his son: *Potter v. Baklwin*, 133 Mass. 427; or that he knew noth-

ing about the will, and that they had got round him and "confuddled" him: *Stephenson v. Stephenson*, 62 Iowa, 163; then it is also equally true that juries will not be able, if they give credence to these statements, to prevent their exercising a controlling influence upon the question of whether or not undue influence was exercised. Declarations made by a testator at the time of executing his will are admissible as parts of the *res gestæ*: *Nelson v. McKinnahan*, 55 Cal. 308. Any evidence which tends to show that the disposition of his property by the testator was or might have been the result of his own desires or preferences, as well as of undue influence, or, on the contrary, that it must have been the result of undue influence rather than of his own desires or preferences, is admissible. His feelings are likely to find expression in words. Hence his declarations, whether made before or after the execution of his will, may be received for the purpose of showing what his desires or feelings were with respect to any particular person, whether this tends to support or to overthrow the will: *Canada's Appeal*, 47 Conn. 450; *Roberts v. Trawick*, 17 Ala. 55; 52 Am. Dec. 164; *Gilbert v. Gilbert*, 22 Ala. 529; 58 Am. Dec. 268; *Stephenson v. Stephenson*, 62 Iowa, 163; *Neal v. Potter*, 40 Pa. St. 483; *Allen v. Public Administrator*, 1 Bradf. 378; *Griffith v. Diffenderfer*, 50 Md. 466; *Dye v. Young*, 55 Iowa, 433.

May Affect Part only of the Will. — Though undue influence has been effectively exercised, it does not always vitiate the whole will. It may have been restricted to procuring a devise or bequest in favor of a particular person or object, and the remainder of the will may be the result of the free agency of the testator, acting without even a suggestion from any other person. If a will consists of separable parts, and it is possible to affirm that some of them are not affected by any undue influence, and they may be permitted to stand alone without doing injustice to the testamentary intentions of the decedent, then those parts will remain in full force, and the will will be denied probate only as to the part or parts procured by the undue influence: *Baker's Will*, 2 Redf. 179; *Harrison's Appeal*, 48 Conn. 202; *Lynn v. Campbell*, 88 Ala. 462; *Lord Trimblestown v. D'Alton*, 1 Dow & C. 85; 2 Bligh, N. S., 427.

BROWNING v. HINKLE.

[46 MINNESOTA, 544.]

CORPORATIONS. — DECLARATIONS OF THE OFFICERS OF A CORPORATION bind it only when made in the course of the performance of their authorized duties, so that such declarations constitute part of the *res gestæ*.

CORPORATIONS. — ONE SUED FOR THE PRICE OF STOCK ISSUED TO HIM CANNOT escape his obligation to pay therefor by proving that certain officers of the corporation told him that such stock had been paid for by another person, unless he further proves that in making such declaration such officer was acting for the corporation and clothed with authority to speak for it.

Davis and Farnam, for the appellant.

Keith, Evans, Thompson, and Fairchild, for the respondent.

DICKINSON, J. This is an action by a receiver of an insolvent corporation, the Price-Condit Fence Company, to recover

the price of fifty shares of the stock of the corporation, which were issued to the defendant, and for which, as is alleged, only partial payment has been made. It is admitted on the part of the defendant that he did not pay to the corporation the price of the stock, but it is claimed that he did not purchase the stock from the corporation, but from one Foote, one of its members, and that Foote, being entitled to receive the stock, transferred his right to the defendant, and that the corporation issued the stock to the defendant in place of Foote, in accordance with the agreement of the parties. It is also claimed that the stock was fully paid for by Foote and his associates, the original incorporators, by the transfer by them to the corporation of certain patent rights and property at a valuation agreed upon, which, with some money paid, amounted to eighty thousand dollars, which was designated in the articles of incorporation as the amount of the capital stock.

Upon the case as presented at the trial, the court directed a verdict for the defendant. The reason upon which the court acted was, that the evidence was deemed to show, without contradiction, that before the defendant purchased the stock, or the interest represented by it, he made inquiry of some of the officers of the corporation, and that they stated to him that the stock had all been paid for in the manner above indicated, and that the defendant was thus induced to purchase from Foote, and to receive the certificate of stock from the corporation; and it is upon this ground that the respondent here seeks to sustain the ruling of the court. It is not here claimed that the evidence of payment in fact was so conclusive that the court would have been justified in taking that issue from the jury. The declarations of the officers of the corporation, that the stock had been paid for, were not shown to have been made under such circumstances that they would be binding upon the corporation as its declarations, or preclude it from afterwards asserting the fact to be otherwise than as represented. Aside from the somewhat vague and uncertain character of the proof as to who made the alleged declarations, the evidence is defective in not showing in any manner that when the officers or directors made the alleged representations, they were clothed with authority to speak for the corporation. The mere fact that one is a director, president, secretary, or other officer of a corporation does not make all his acts or declarations, even though relating to the affairs

of the corporation, binding upon the latter. Such persons are mere agents, and their declarations are binding upon the corporation only when made in the course of the performance of their authorized duties as agents, so that the declarations constitute a part of their conduct as agents, — a part of the *res gestæ*: *Presley v. Lowry*, 25 Minn. 114; *Tripp v. New Metallic Packing Co.*, 137 Mass. 499; *Peck v. Detroit Novelty Works*, 29 Mich. 318; *Johnston v. Elizabeth B. & L. Ass'n*, 104 Pa. St. 394; *Cook on Stocks*, 2d ed., sec. 726, and cases cited. There was no proof of authority on the part of any of the persons whose declarations are relied on, beyond the fact that they were officers or directors. Nor are the circumstances disclosed under which the representations were made. So far as appears, the statements were in no way connected or associated with the performance of any duty devolving upon, or any power delegated to, the agents who made them. While the representations relate to the subject of the corporate stock, yet the theory of the defendant, and the evidence in support of it, are opposed to the idea that the representations constituted a part of a transaction of sale of the stock by the corporation; for the contention of the defendant is, that he did not purchase from the corporation at all, but from Foote. Our conclusion is, that the evidence was incompetent, and did not justify the court in directing a verdict for the defendant.

Order reversed.

CORPORATIONS — DECLARATIONS OF OFFICERS, WHEN BINDING ON CORPORATION. — The admissions of the president of a corporation will be evidence against the corporation, if made by him in the execution of his duties, about the business of the corporation, and within the scope of the authority usually exercised by him: *Chicago etc. R. R. Co. v. Coleman*, 18 Ill. 297; 68 Am. Dec. 544, and note; and the same rule is true of a corporation superintendent: *Consolidated etc. Machine Co. v. Keifer*, 134 Ill. 481; 23 Am. St. Rep. 683. In *Peet v. Sherwood*, 47 Minn. 347, it was held that a letter from an authorized agent of a corporation, announcing the approval of an application, was in itself an acceptance, and not mere hearsay evidence thereof. But the representations made by the president of a corporation, in negotiating the sale of corporate bonds, that the mortgage securing them was the first lien on the corporate property, though made within the scope of his authority, are not admissible against a stockholder not present when they were made, to affect his interest as mortgages of the corporation under a prior mortgage: *Mullanphy Sav. Bank v. Schott*, 125 Ill. 655; 25 Am. St. Rep. 401, and note.

GUILFORD v. MINNEAPOLIS, SAULT STE. MARIE, AND ATLANTIC RAILWAY COMPANY.

[48 MINNESOTA, 560.]

TRUST DEED, NOTICE OF CONDITIONS OF. — One who purchases a bond with interest coupons attached, which bond recites that its payment and the payment of the interest thereon are secured by a mortgage or a deed of trust to a specified trust company, and that it shall not be obligatory until certified by such company, is not put upon inquiry by the recitals in the bond, and thereby charged with notice that by the terms of the trust deed no action at law or in equity can be maintained until after a requisition has been made upon the trustees, signed by holders of not less than one fourth in amount of the bonds secured by such deed, and he has unreasonably refused to act thereon, and therefore the holder of any of such bonds, or any coupons thereon, is entitled to bring an action to enforce their payment without resorting to the remedies specified in the deed.

TRUST DEED, WHEN BOND-HOLDERS MUST TAKE NOTICE OF. — If a bond merely refers to the fact that it is one of a series of bonds, all of which are secured by a trust deed, and that it is not obligatory unless certified by the trustees named in such deed, such recital is too general to charge bona fide purchasers of bonds with notice that by the terms of the deed of trust they are not entitled to maintain an action upon their bonds until after the holders of one fourth in amount of all the bonds secured by the deed have made a requisition on the trustees to take proceedings for their collection, and he has unreasonably refused so to do.

J. Guilford, for the appellant.

Alfred H. Bright and M. B. Koon, for the respondent.

VANDEBURGH, J. The plaintiff is the owner and holder of a certain first-mortgage bond (No. 4028) made by the defendant for one thousand dollars, with semi-annual interest, payable to the Central Trust Company of New York, or bearer, with interest coupons attached, each purporting on its face to be for six months' interest on the first-mortgage bond of the defendant, No. 4028. The bond is one of a series of bonds issued by defendant, and recites that the payment of each and all of the bonds, together with the interest thereon, is secured by a mortgage or deed of trust executed by the defendant company to the Central Trust Company of New York, conveying its railway, and all extensions, branches, equipment, property, revenues, and franchises, and that it should not be obligatory until certified by said trust company. And the bond was accordingly certified as follows: "This is one of a series of bonds issued by the Minneapolis, Sault Ste. Marie, and Atlantic Railroad Company, as authorized by the mortgage or deed of trust referred to in the within bond." It also

recites that on six months' default in the payment of the interest, the principal may be made due in the manner set forth in said mortgage, and by the terms of the deed of trust referred to, it was provided that all the bonds secured thereby should be held by each and every holder subject to the trusts and agreements declared and set forth in the deed of trust. And among the stipulations therein we find the following, in respect to proceedings to enforce the collection of such bonds in case of default: "If the said party of the first part, or its successors, shall make any default in the payment of any of the principal money, or in the interest of said bonds, or some of them, according to the tenor thereof, or of the coupons thereto annexed, or shall make default in the performance of some other covenant hereof, and in either such case such default shall have continued for six months after demand made for such payment or performance, then, and in either such case, upon a requisition in writing signed by the holder or holders of said bonds to an aggregate amount of not less than one fourth thereof, and a proper indemnification by such holder or holders of the said trustee against the cost and expenses to be by it incurred, it shall be the duty of the trustee to enforce the rights of the bond-holders under these presents by entry, sale, or suit or suits, in equity or at law, as it, being advised by counsel learned in the law, shall deem most expedient for the holders of said bonds. It is hereby further provided and expressly agreed and made binding upon each and every holder of the bonds secured by this indenture, as a condition upon which the said bonds are to be taken and held by such holder, that no proceedings, at law or in equity, shall be taken by any bond-holder or bond-holders to enforce the payment of the said bonds, or to foreclose the equity of redemption under this instrument, or to procure a sale of the property covered thereby, independently of the party of the fourth part as trustee, or its successor and successors in said trust, except after a requisition shall have been made to the said trustee in manner and form as hereinbefore provided, and also until after a refusal or unreasonable delay of the said trustee to comply with said requisition according to the provisions herein made in respect thereto.' And the court finds that none of said conditions contained in the mortgage deed have been complied with on the part of plaintiff."

1. The obligor covenants in the bond to pay the interest as well as the principal. The interest is evidenced by the cou-

pons, which are each referred to in the bond, and identified as being for six months' interest thereon, and are to be treated as a part of the bond, and subject to the same conditions as the principal, and to the terms of the trust deed. The plaintiff, as the holder of the bond and coupons, was put upon inquiry by the recitals in the bond, and charged with notice of all the terms and conditions of the trust deed, and is bound by the stipulation therein, above referred to, providing that each bond should be held subject to the agreements in such deed. When, therefore, plaintiff purchased and became the holder of the bond in question, he voluntarily became a party to such stipulations, and is bound by the contract.

2. It will be observed that the mortgage covers all the property, revenues, and franchises of the defendant; and in case of default in the payment of the interest, a procedure for the collection thereof, by the mutual agreement of the parties, is provided for in the deed, through the enforcement of the security. Some such provisions appear to be necessary in such cases, on account of the nature of the security, number of the bond-holders, and character of the business from which the revenues are derived. Regard must be had to the interests of the bond-holders, or the majority of them, as a class. Their rights, for the most part, depend upon the terms of the trust deed, and it is competent for them to agree upon the same. Plaintiff was brought "into contract relation with each and all of his co-bond-holders, and his absolute rights as a bondholder are limited by the provisions of the bond and mortgage and the peculiar nature of the security": 2 Beach on Private Corporations, sec. 769; Taylor on Corporations, sec. 674. Hence it is the contention of the defendant that by the terms of the trust deed accepted and agreed to by all the bondholders, the defendant is not entitled to maintain this action, because it appears that the remedy thereby provided has not been resorted to in the first instance. And this contention is, we think, warranted by the terms thereof, wherein, it will be seen, it is expressly agreed by each and all the bondholders, as a condition on which the bonds are taken and held, that no proceedings, at law or in equity, shall be taken by any bondholder to collect his bond until after a refusal or unreasonable delay on the part of the trustees to proceed as therein required. The court may undoubtedly interfere in cases of fraud or collusive mismanagement or neglect of duty on the part of the trustees, and they may be compelled to act,

when it is clearly their duty to proceed, in order to protect the interests of the bond-holders: Taylor on Corporations, sec. 815; *First Nat. Fire Ins. Co. v. Salisbury*, 130 Mass. 303. This would not be inconsistent with the terms of the contract. Any appropriate remedy would undoubtedly be open to the bondholder in case of abuse of their power, or clear neglect of duty on the part of the trustees.

The case presents no constitutional question. The conditions under which suits by individual bond-holders may be sustained upon the bonds is the subject of contract. So, also, the order in which remedies shall be pursued may be regulated by the legislature: *Swift v. Fletcher*, 6 Minn. 550.

It is incident to a contract involving joint relations that one of several parties may not be authorized to sue alone, except upon certain conditions or in certain contingencies. It is a part of the risk of the venture. But the ordinary remedies which are provided for the protection of parties so jointly interested, as in the case of partners or corporations, are usually found adequate and available. The cases cited by the appellant are not in point here. The proceedings by the trustees are not there made the exclusive remedy. None of them question the doctrine that it is competent for the parties to agree to make it so in the first instance: Jones on Corporation Bonds, sec. 340. In *Widener v. Railroad Co.*, 1 Week. Not. Cas. 472, the terms of the deed did not prohibit a judgment, but merely the sale on execution of the property mortgaged by the company.

Judgment affirmed.

ON REHEARING.

VANDEBURGH, J. Upon the original argument of this case, the attention of the court was more particularly drawn to the terms of the stipulation in the trust deed in respect to the enforcement of the bonds, which it was claimed is binding upon the bond-holders. The stipulation is set out in full in the foregoing opinion. The proposition is not seriously disputed that if this stipulation had been actually incorporated into the bonds, or had been so clearly referred to by recital as to notify the bond-holders of its existence, and in legal effect import it into the bonds, the purchasers and holders would have taken and held the bonds subject thereto, and would have been bound by it. An analysis of the authorities cited will, we think, show that none of them hold a different doctrine. Thus in *McClelland v. Norfolk Southern R. R. Co.*, 110 N. Y.

469, 6 Am. St. Rep. 397, the mortgage provided, among other things, that in every case of default of the payment of the money thereby secured, or any part thereof, in respect of any covenant or agreement in the bonds secured thereby, the duty of the trustees in the premises was declared to be subject to the right and power of a majority in interest of the holders of the bonds to instruct the said trustees to waive such default, or enforce their rights thereunder, etc. And it was held that by reason of the reference made on the face thereof to the terms and conditions of the bonds, the holders were bound by the provisions of the trust deed in respect to a waiver of defaults; and the court say (110 N. Y. 477; 6 Am. St. Rep. 402): "If, therefore, the act of the trustees in postponing payment of the interest becoming due was authorized by the provisions of the mortgage, it must follow that the holders of coupons are bound by their action, and are not entitled to maintain actions at law upon such coupons." All the cases agree that the coupons stand upon the same footing as the bond, and the rights of the holder are of no higher order. They are subject to the same conditions as a bond, in respect to their relation to the trust deed: *McClure v. Township of Oxford*, 94 U. S. 429.

The only question requiring serious consideration in this case is the sufficiency of the notice in the bonds to make them subject to the provisions in the trust deed, above referred to, in the hands of the *bona fide* holders. Upon this question the authorities are not very clear or satisfactory. In the case above cited from the court of appeals in New York, the reference in the bonds was as follows: "Full payment of the principal and interest of the said series of bonds is secured by deed of trust or mortgage upon the property and franchises of said railroad, upon the terms and conditions fully set forth in the said mortgage or deed of trust"; and in case of default in the payment of the interest for six months, the principal was, at the option of the holder, to become due and payable immediately, upon the terms and with the effect mentioned in said deed of trust. These premises were held to be notice to the holders, so that the conditions of the deed referred to were to be read in connection with the bond as a part of the agreement by which the bond-holders were bound. In the case of *Manning v. Norfolk Southern R. R. Co.*, 29 Fed. Rep. 838, decided by the judge of the United States circuit court for the eastern district of Virginia, and which was cited

on the argument of the last-mentioned case in the court of appeals, but not followed, this question was not considered, but the court held that the provisions of the mortgage were not sufficiently clear to warrant the construction claimed for it by the defendant. In *Oaylus v. New York etc. R. R. Co.*, 10 Hun, 295, the court seems to hold that the mortgage, being referred to in the bonds, became a part of them, and that a purchaser was bound by statements in the mortgage affecting his interest. The holders were not, however, in that case, *bona fide* holders, and the questions involved were unlike that under consideration here. The case was affirmed in 76 N. Y. 609, but this point does not seem to have been considered. In *McClure v. Township of Oxford*, 94 U. S. 429, the bond was issued by a municipal corporation, and recited on its face the act which authorized its issue. Held, that the holder was bound to take notice when the statute took effect, and that the bond was, by its terms, prematurely issued. But the general rule is, that when bonds on their face import a compliance with the law under which they are issued, though that be referred to therein, *bona fide* purchasers are not bound to look further for evidence of a compliance with the conditions of the grant of power: *Commissioners of Knox v. Aspinwall*, 21 How. 539, 545. The only matters open for inquiry in a suit by the purchaser is the *bona fides* of the purchase, and the statutory authority to issue the bonds: *Rouede v. Mayor etc.*, 18 Fed. Rep. 719, and cases. The doctrine of these and other cases shows that the duty to make inquiry may be limited by the general nature of the recital. We do not think that a mere recital that the bonds were secured by the trust deed, with only a general reference to a description of the deed, would affect the negotiability of the bond, or be sufficient to put purchasers upon inquiry, so as to constitute notice to a *bona fide* purchaser that they were to be enforced at law only after an attempt to collect the same through the trustees, as provided by the deed. It is true that the bond disclosed on its face that the entire series of bonds of which this is one is secured by a mortgage which covers all the property, franchises, and revenues of the mortgagor, and the security is for the benefit of all; and equity, therefore, would not permit one bond-holder, by independent legal proceedings, to secure an unjust advantage over the other bond-holders, if the revenues or property of the company were insufficient to pay all. They have a common interest in the

security, and all are equally entitled to the benefit of it. No one of them can be permitted to obtain an equitable preference over his associates: *Pennock v. Cos*, 23 How. 117, 131; *Commonwealth v. Susquehanna etc. R. R. Co.*, 122 Pa. St. 306; Jones on Corporation Bonds, secs. 292, 293. All of the bonds stand, presumptively, upon the same footing.

Undoubtedly the peculiar provision in the trust deed under discussion was intended to protect the mortgaged property from the liability of seizure at the suit of individual bondholders; but as it is inconsistent with the absolute obligation which the bond imports on its face, and is not suggested by anything appearing thereon, it would hardly be a fair construction of the instrument to hold that the bond was notice to the holder that his right to bring suit for the interest when due was qualified by anything in the trust deed. The rights of the other bond-holders are not affected by the prosecution of the suit or recovery of the judgment. The question could only be raised on their behalf upon interference with their rights, actual or threatened, under attachment or execution sued out in an action at law. We do not think the notice in the bond that it is not to be obligatory until certified by the trust company, or the certificate of the trust company indorsed thereon, were intended to be, or are in fact, notice of the provisions of the trust deed in relation to the enforcement of the bonds. The certificate was merely the method of authentication agreed on, and was essential to their validity; but it is notice of nothing more: Jones on Corporation Bonds, sec. 210. It shows that the bonds were duly authorized and lawfully issued, and were genuine bonds of the class and number secured by the mortgage, and therefore entitled to the benefit of the security. But there is nothing in it to put holders upon inquiry in respect to provisions relating to personal actions upon the bonds, or reasonably calculated to suggest that the trust deed might contain provisions other than relating to the enforcement of the same as security. Bonds of this character generally refer to the mortgage or trust deed by which they are secured; and being placed in the market as negotiable securities, to be sold to *bona fide* purchasers, the fair inference from the general recital in the bond that it is one of a series secured by a mortgage deed to a certain trustee upon the property of the railway company whose absolute obligation it purports to be is, that such recital is introduced into the bond to indicate the nature of the security, and add to the credit of

the bond, and does not alone import into the bond special provisions not affecting the nature or enforcement of the security and at variance with the tenor of the bond itself. The policy of the law is to hold such instruments negotiable, unless there is enough on the face of the bond to suggest inquiry in respect to the existence of facts destroying their negotiability.

We conclude, therefore, that, upon the evidence in the case, the plaintiff is entitled to recover, and the judgment is accordingly reversed.

BONDS, RECITALS IN. — NOTICE: See note to *Morris Canal etc. Co. v. Fisher*, 64 Am. Dec. 432; note to *De Voss v. Richmond*, 98 Am. Dec. 684. A recital of an indenture in a bond concludes the signers, where it was executed to secure the faithful performance of duties imposed by the indenture on one who was a party thereto: *Fletcher v. Jackson*, 23 Vt. 581; 56 Am. Dec. 98, and note. See also *McClelland v. Norfolk etc. R. R. Co.*, 110 N. Y. 469, 6 Am. St. Rep. 397, cited in the opinion, where it was held that a reference in coupons to the mortgage and bonds, and in the bonds to the conditions of the mortgage, charges the holders of both coupons and bonds with notice of the provisions contained in the instrument to which reference is made.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

LAWRENCE v. SPRINGER.

[29 NEW JERSEY EQUITY, 280.]

PAROL LICENSE. — EASEMENT CANNOT BE IMPOSED upon land by force of a parol license, especially when the parol contract has not been proved to the point of demonstration, and the revocation of the license will not work a considerable or irreparable damage to the licensee.

PAROL LICENSE TO DRAIN LAND over the land of another is revocable, in the absence of proof that its revocation will work irreparable damage to the licensee.

M. P. and S. H. Grey, for the appellant.

A. H. Swackhamer and D. J. Pancoast, for the respondents.

BEASLEY, C. J. The facts necessary to the intelligibility of the views to be expressed can be stated in a few words.

There are three several tracts of land in the county of Gloucester, lying along the Delaware River. A part of each of these consists of meadows that were injuriously affected by the flow of the tides, so that in the year 1851 commissioners were appointed under the act (Rev. 642) to enable the owners of the meadows to improve the same. By force of that proceeding, certain embankments, drains, and sluices were established, and an apportionment of the expense of constructing and maintaining them was duly made. That this course of law was and is legal no one disputes. Of the three tracts thus improved, the respondents, who were complainants in the court below, are at present the owners of the central one, and which is drained on one side through the property of the appellant, and on the other through that belonging to one Beckett, who is not a party to this suit.

This being admittedly the legal situation, some years ago the respondents, being minded to reclaim other parts of their low lands, removed the bank on their property erected by the commissioners nearer to the river, so as to take in about twenty-five acres of additional meadow, and thereby at least doubled the acreage of their farm to be drained. By means of subsidiary drains laid in the superadded land thus reclaimed, they carried the water from it into the drains laid by the commissioners, so that thereby part of such water is carried and discharged through the property of the appellant, and the remainder through that of Mr. Beckett, above named.

The question, therefore, from this attitude of affairs, necessarily arose, By what right did the respondents burden the land of the appellant with the passage and discharge of this superadded water? It was undeniable, and was therefore admitted, that it was not, in any degree, by force of the action of the statutory commission, for it was the consequence of a radical alteration of that plan and adjustment. What the respondents claimed was, and is, an easement,—that is, the right, in favor of their own lands, to discharge this water onto and through the lands of the appellant. There was no contention that they possessed a deed or writing granting to them such right, but their contention was, that the appellant had orally consented to the imposition of this burden on her land, and that, in reliance on such assent, they had incurred certain expenses in erecting their bank and drains, and that, as a consequence, she would not, in equity, be permitted to recall her license. This view was sustained in chancery, and the appellant was enjoined from stopping the flow of this water over her land, as she threatened to do.

It will be observed that the inquiry thus supervening involves the difficult and troublesome problem as to what extent, and under what circumstances, a court of equity will disregard the well-established rules of the common law, as well as the plain provisions of the statute of frauds, in the establishment of a servitude of this kind.

In the present instance, the proposition upon which this decree has been founded is this: that a parol license, without any consideration moving to the licensor, operating as a part of an easement, is irrevocable in equity, where the licensee has gone to expenditures in the erection of structures on his own land in pursuance of such authority.

In the sequel it will become requisite to consider how far

This formula, even in its extremest latitude, will support the decree before us in its application to the facts of the case; but before approaching that inquiry, it seems necessary, in order to avoid misconception on the subject, to consider whether the equitable principle thus propounded has any place, and if so, to what extent, in the legal system of this state.

It has not been, and it cannot be, denied that such a grant as the one in question cannot be enforced in a court of law; such easements, being incorporeal, lie in grant, and their creation requires an instrument under seal. Nor is it questioned, nor questionable, that a parol imposition of a servitude of this kind upon land is in flat contradiction of the statute of frauds. It is true, indeed, that in one class of cases, as is well known, courts of conscience have felt dispensed from putting in force the provisions of that act. This has been the course pursued where a parol agreement for the purchase of lands, or of some interest in them, has been performed to the extent of possession having been taken in part execution of such contract. But while this is the undeniable rule in equity, it should be ever borne in mind that its introduction has been regretted by the wisest judges. "The statute," says Lord Redesdale, "was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practicing in courts of equity than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements, from the necessity of the case, would have been reduced to writing. Whereas, it is manifest that the decisions on the subject have opened a new door to fraud." And these strictures are pointed with the emphatic declaration that "it is therefore absolutely necessary for courts of equity to make a stand, and not carry the decisions further": *Lindsay v. Lynch*, 2 Schoales & L. 4. And in the same vein, Judge Story (2 Story's Eq. Jur., sec. 766) says that "considerations of this sort have led eminent judges to declare that they would not carry the exceptions of cases from the statute of frauds further than they were compelled to do by former decisions." To the same purpose are the criticisms of Chancellor Kent in *Phillips v. Thompson*, 1 Johns. Ch. 149, and of Chancellor Zabriskie in *Cooper v. Carlisle*, 17 N. J. Eq. 529.

That the exception to the statute must be greatly amplified

if it is to embrace and validate the parol contract in the present instance, is entirely manifest. Indeed, it may be said that after such an extension it would scarcely be susceptible of further enlargement. When A permits B to build a house upon his land, the situation almost necessarily implies the existence of some contract which is thus partly performed between them; to some extent, therefore, such a matter does not rest absolutely in parol, and the area of possible fraud or perjury is therefore thus circumscribed and hindered. But when B, from his own land, turns his water into the drains on the land of A, the situation does not imply a contract. On the contrary, the situation denotes simply a trespass; consequently, the existence and character of the contract, if one exists, is the pure creature of parol testimony. So wide would be the principle of such an impairment of the statute that it is difficult to see how it could be circumscribed. It would seem to be applicable to the creation of every species of easement. For example, all rights of way, all rights to light and air, the right to discharge impure water or smoke and noisome smells, and other incorporeal rights of the same kind, could, in most cases, be established by the unassisted force of parol evidence. Plainly, the principle is of great consequence, and the question is, whether it prevails in this state.

In responding to this question in the affirmative, the experienced and able vice-chancellor who decided this case relied upon two recent opinions in the court of chancery as containing the equitable rule now applicable, and which has been already expressed, and in addition to these was cited the case of *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463. This last case was decided in this court, and rests upon satisfactory grounds, but its applicability in the present instance is not perceived; then, this court was called upon to test the equitable efficacy of a written license under certain conditions; now, it is to pass upon an oral license under very different conditions. The language of the opinion must be construed with relation to the facts then under consideration. In the reported case, the statute of frauds was not a factor influencing the determination, while on the present occasion it is one of prime importance. The two cases do not stand upon the same common basis.

The two English cases cited appear to be equally alien from our present subject. One of these is that of *Duke of Devonshire v. Elgin*, 14 Beav. 530, and it is entirely plain that the

circumstances called for the application of a rule altogether unlike the one now in question. In his opinion in the present case, the vice-chancellor describes this as an instance "of a parol license to maintain a water conduit across the licensor's land to supply a village with water"; but the fact that the equitable effect of such an unwritten authority, intrinsically considered, was not in any degree passed upon appears to have escaped observation. In the reported case the answer admitted the agreement, and it was so found, the chancellor saying, "I am of opinion that the passages read from the answer show that there was a parol agreement to allow the watercourse to be made through the defendant's land, in consideration of payment of a reasonable sum"; and consequently works that had been built in reliance on such an admitted contract were not permitted to be disturbed. It is obvious that the point under consideration was not in any wise decided.

The other English authority relied on is that of *Mold v. Wheatcroft*, 27 Beav. 510; but the briefest statement of the facts of that case will serve to show that the rule controlling them cannot be of any concern in our present inquiry. It is true, as the vice-chancellor says, that this "was a case of a right of way," but such a description is not complete, for it was a right to a railway that was in question. The defendant, being invested by act of Parliament with the power to lay a railway over the complainant's land, paying a reasonable compensation for such privilege, had entered upon such property with the assent of its owner and made the construction in dispute; it was therefore a case plainly within the equitable rule, already stated, of a parol agreement for the purchase of an interest in land, and an entry and possession by force of such an agreement; and there was also parliamentary authority to do the act consented to. In short, the case is identical in all its essential features with that of *Trenton Water Power Co. v. Chambers*, 9 N. J. Eq. 471. It certainly cannot be necessary to pause for an instant to point out the dissimilarity between such a conjuncture and the one now being considered.

The result seems to be, that neither of the cases cited in the opinion of the vice-chancellor from the opinions of the English chancellors supports in any noteworthy degree the rule embodied in the decree now before this court. Nor has it appeared from my own researches in that field that there is to be found any authority directly upon this question; but in making this remark, it should be said no stress is laid on

the two cases which are to be found in 2 Eq. Cas. Abr. 520, although in the state of Pennsylvania they appear to have had a decided effect in leading to the promulgation by the courts of the doctrine now under criticism. The book referred to is of slight repute, and it alludes to, rather than reports, these two judicial resolutions. The first of them is contained in six lines, stating that A diverted a watercourse, which put B to great expense in laying of sooths, etc., and the diversion being a nuisance to B, he brought his action, but an injunction was decreed upon a bill exhibited for that purpose, it being proved that B did see the work when it was carrying on, and connived at it, without showing the least disagreement, but rather the contrary. *Short v. Taylor*, in Lord Somers's time, was cited, which was this: Short built a fine house; Taylor began to build another, but laid part of his foundation on Short's land. Short, seeing this, did not forbid him, but, on the contrary, very much encouraged it; and when the house was built he brought his action, and Lord Somers granted an injunction.

It will be observed that this case of *Short v. Taylor* was correctly disposed of, for the facts do not seem susceptible of other than one of two interpretations, viz., that Taylor took possession of the land in question with the assent of Short, in which event it was a license executed by possession, which would be enforceable in equity according to the established rule; while the other case, from the insufficiency of its disclosures, is unintelligible in any reasonable sense, as it is not shown that the licensee had incurred any expense or would sustain any damage in consequence of the revocation of the authority to divert the water.

With respect to the state of the law in this country on this subject, it is sufficient to say that it exhibits much contrariety of judicial opinion. A copious collection of such authorities will be found in 13 Am. & Eng. Ency. of Law, tit. License, 550, and in the text of that work it is declared that "in most of the states it has been held that even where money has been expended by the licensee on the faith of the license, the licensor may exercise his power of revocation." And indeed Professor Pomeroy himself, although his work on specific performance is cited by the vice-chancellor in the support of the doctrine of the irrevocability of parol license of this kind, after referring to such principle as prevailing in certain jurisdictions in this country, concludes with the decided declaration

that "this rule is undoubtedly opposed to the common-law doctrine concerning licenses as it prevails in England and in most of the American states."

In this view I concur, and shall conclude this succinct examination of the subject with the remark that if the principle that licenses of this character are to be, under the conditions in question, treated as irrevocable, the same principle, if logical reasoning is to be maintained, would, of necessity, have to be extended so as to control most of the regulations of the statute of frauds, etc. If a parol license, inefficacious by force of the act, should be rendered efficacious by reason of a losing part performance on the side of the licensee, it would be difficult to refuse, on a like ground, to apply a similar quality to a sale of goods equally within the statutory condemnation. Suppose A, a merchant, should, by parol, purchase a cargo of merchandise of B, to be delivered at a certain day, and trusting in such agreement of sale, should, to the knowledge of B, proceed at great expense to procure a vessel and prepare it for the voyage, would such sale be enforceable either at law or in equity? In such case it would not be pretended that by reason of part performance and great loss a practicable equity would arise; and yet how, in point of principle, is such supposed case distinguishable from that of one of these licenses after part performance by the licensee? The fact is, that a statute that renders legal the revocation of certain classes of contracts is founded on the theory that while, by its force, great losses will many times fall upon promisees, nevertheless such losses must be endured by such sufferers, in order that the mass of the community shall be protected against worse disaster. When the legislature has declared that, in general, with respect to certain subjects, there is great danger of fraud and perjury if parol evidence be received, how is it competent for a court to declare there is no such danger in particular instances of such subjects? What reason can be assigned why, in the present case, this appellant should not be protected against the danger of fraud or perjury, which the statute assumes is imminent in such cases?

My general conclusion is, that servitudes cannot be imposed upon land by parol transaction, except to the extent above indicated, as evidenced by the ancient decisions in the English chancery, and that our own courts should not extend that limit.

But whatever views may be entertained by others on this

subject, it is still, as it seems, demonstrably clear that the decree before this court cannot be sustained.

Whether the broad rule adopted in the court below, or the narrow one just indicated, be applied for present purposes, the result must be the same, for the proofs do not make either rule effective in favor of the respondents.

Nothing is clearer or more settled than that in all cases in which any court has validated an encumbrance imposed upon land by force of a parol contract, that such contract has been required to be proved to the point of demonstration, and that the repudiation of it would work irreparable injury. Both these essentials are wanting to the affair before the court.

In the first place, there was no such proof as that just indicated as to the existence of the alleged license.

Such fact was attempted to be proved in two ways: 1. By showing an express consent to the easement by the agent of the appellant; and 2. By the circumstance that the appellant saw the structures building on the respondents' land and remained silent.

On the first head it is insisted that the son of the appellant, being her agent, gave the license in question. But the testimony in this particular is conflicting, and leaves the matter in much doubt. The son of the appellant explicitly denies that he consented to the use of the appellant's land as claimed. This denial is controverted by one of the respondents, who is supported in some degree by the other. The preponderance of proof, if it exist, is but slight, and indubitably falls far short of that measure of evidence which, in these cases, has always been deemed requisite. According to Professor Pomeroy, on such occasions as this the most "certain and unmistakable evidence" is inexorably demanded, and it is manifest that this requirement is not fulfilled by the above-stated evidential contradictions, that are nearly in equipoise.

Also, on the assumption that the agent of the appellant granted the license in question, still the case of the respondents is fatally defective, because it clearly appears that their expenditures were not made in reliance upon such license. In the entire line of cases on this subject, it is believed that in no instance has relief even been extended to a licensee who has failed to show that he had incurred large expense in the confidence that his license would not be revoked. In the instance in hand the license that is set up was given when the entire work on the respondents' land was, in the language of

that "this rule is undoubtedly opposed to the common-law doctrine concerning licenses as it prevails in England and in most of the American states."

In this view I concur, and shall conclude this succinct examination of the subject with the remark that if the principle that licenses of this character are to be, under the conditions in question, treated as irrevocable, the same principle, if logical reasoning is to be maintained, would, of necessity, have to be extended so as to control most of the regulations of the statute of frauds, etc. If a parol license, inefficacious by force of the act, should be rendered efficacious by reason of a losing part performance on the side of the licensee, it would be difficult to refuse, on a like ground, to apply a similar quality to a sale of goods equally within the statutory condemnation. Suppose A, a merchant, should, by parol, purchase a cargo of merchandise of B, to be delivered at a certain day, and trusting in such agreement of sale, should, to the knowledge of B, proceed at great expense to procure a vessel and prepare it for the voyage, would such sale be enforceable either at law or in equity? In such case it would not be pretended that by reason of part performance and great loss a practicable equity would arise; and yet how, in point of principle, is such supposed case distinguishable from that of one of these licenses after part performance by the licensee? The fact is, that a statute that renders legal the revocation of certain classes of contracts is founded on the theory that while, by its force, great losses will many times fall upon promisees, nevertheless such losses must be endured by such sufferers, in order that the mass of the community shall be protected against worse disaster. When the legislature has declared that, in general, with respect to certain subjects, there is great danger of fraud and perjury if parol evidence be received, how is it competent for a court to declare there is no such danger in particular instances of such subjects? What reason can be assigned why, in the present case, this appellant should not be protected against the danger of fraud or perjury, which the statute assumes is imminent in such cases?

My general conclusion is, that servitudes cannot be imposed upon land by parol transaction, except to the extent above indicated, as evidenced by the ancient decisions in the English chancery, and that our own courts should not extend that limit.

But whatever views may be entertained by others on this

subject, it is still, as it seems, demonstrably clear that the decree before this court cannot be sustained.

Whether the broad rule adopted in the court below, or the narrow one just indicated, be applied for present purposes, the result must be the same, for the proofs do not make either rule effective in favor of the respondents.

Nothing is clearer or more settled than that in all cases in which any court has validated an encumbrance imposed upon land by force of a parol contract, that such contract has been required to be proved to the point of demonstration, and that the repudiation of it would work irreparable injury. Both these essentials are wanting to the affair before the court.

In the first place, there was no such proof as that just indicated as to the existence of the alleged license.

Such fact was attempted to be proved in two ways: 1. By showing an express consent to the easement by the agent of the appellant; and 2. By the circumstance that the appellant saw the structures building on the respondents' land and remained silent.

On the first head it is insisted that the son of the appellant, being her agent, gave the license in question. But the testimony in this particular is conflicting, and leaves the matter in much doubt. The son of the appellant explicitly denies that he consented to the use of the appellant's land as claimed. This denial is controverted by one of the respondents, who is supported in some degree by the other. The preponderance of proof, if it exist, is but slight, and indubitably falls far short of that measure of evidence which, in these cases, has always been deemed requisite. According to Professor Pomeroy, on such occasions as this the most "certain and unmistakable evidence" is inexorably demanded, and it is manifest that this requirement is not fulfilled by the above-stated evidential contradictions, that are nearly in equipoise.

Also, on the assumption that the agent of the appellant granted the license in question, still the case of the respondents is fatally defective, because it clearly appears that their expenditures were not made in reliance upon such license. In the entire line of cases on this subject, it is believed that in no instance has relief even been extended to a licensee who has failed to show that he had incurred large expense in the confidence that his license would not be revoked. In the instance in hand the license that is set up was given when the entire work on the respondents' land was, in the language of

the vice-chancellor, "nearly finished," so that the expenses afterwards incurred were plainly trivial. Under such circumstances it has never been claimed, nor can it reasonably be claimed, that there is even a colorable basis for the respondents' bill; for if they did not make their outlays because of the assurances or promises of the appellant, how is it that the latter is to be estopped from asserting her legal rights?

But, further, even if the foregoing considerations should be waived, the respondents' case is, as it is deemed, wholly defective; for if we assume that the son of the appellant gave the license in question, it is plain that such grant was nugatory, for in that respect the son was not the agent of his mother. Nothing can be clearer than this latter proposition; for the entire proof of agency consisted in a statement made by the son, in an affidavit annexed to the answer of his mother in this case, "that he had been her agent for more than twenty years in the conduct of the business relating to her meadow-lands," and in his answer to a question, when examined as a witness, that he had "had the oversight of the farm." This is the entire evidence with regard to this agency and its scope, and it is therefore confidently believed that no one versed in the law will assert, when the situation is pointed out, that such an authorization enabled the son to impose on his mother's land a permanent servitude for the benefit of her neighbor.

This fatal imperfection in the case of the respondents appears to have escaped attention in the court below; but as the defect does not reside in mere technical considerations, but in the fundamental equities of the case, it cannot now be overlooked. The respondents are clearly disentitled to the right which they assert, unless such right was conferred upon them by the appellant; it is not pretended that they had any personal communication with the appellant herself. Their entire claim is, that her son, in express terms, conferred upon them the right in question, and, as is now shown, it is made to appear that the son was destitute of all legal power to do such act, no force whatever is left in their case, either in law or in equity. The subject seems too plain for discussion. It is quite common to commit farm-lands to the management of superintendents; and to judicially declare that such general authorizations confer upon such agents the power to create easements in the lands so put in their charge would introduce a doctrine that would be in the highest degree both impolitic and novel. In our opinion, according to the proofs before us,

this son of the appellant had no more right to impose this servitude on his mother's land than he would have had to mortgage it for the convenience of one of her neighbors.

As to the suggestion that the appellant saw this work progressing, and encouraged, by her silence, such expenditures, and is therefore equitably estopped from making her present contest, the answer is, that assuming that the result thus asserted would ensue from such conduct, we think it clear that the proofs before us do not lay any foundation for the contention. There is not a particle of direct evidence to evince that the appellant knew that this work was being done, and the only indirect evidence to that effect is, that the house in which she lived was within about half a mile off, so that if she had looked she would have seen what was going on. At the time of the trial it appeared that the appellant was over eighty years of age, and was infirm in body; it is not pretended that her attention was called to the subject, so that it is only by way of a conjectural inference that she can be charged with a knowledge that the embankments in question were erecting; and to impute such knowledge to her, what does it signify? If we say she saw her neighbor putting up certain banks on his own property, how did that act intimate to her that it was his purpose, as a necessary incident to the work in progress, to invade her own property? From the evidence it appears that it was at least practicable to drain this newly reclaimed land directly into the river, without bringing any part of its water onto the property of the appellant. Can it be said, therefore, that it is reasonable to infer that, looking at these improvements at the distance of half a mile, she must have known what was in the mind of the respondents with respect to a system of drainage? But further than this, even if she had at the time been informed that it was in contemplation to subject her property to the servitude of being used as a drain for these reclaimed meadows, nevertheless she plainly would not have been chargeable with a knowledge that it was their purpose to accomplish such end without her consent and without legal procedure. We shall presently see that the respondents had the option of establishing a drain over the land of the appellant in a mode entirely legal, or, as they have done, in a mode entirely tortious; consequently, it would be most unreasonable to say that the appellant must have been prescient that they would adopt not the lawful, but the tortious, method, and that thereby, impliedly, she sanctioned

such trespass. We think it incontestible that the appellant did not, reading the case in the evidence before us, give the license in dispute, nor was her conduct such that the respondents had the right to infer that she had done so.

As a last consideration, it is proper to say, that if we were to adopt the doctrine prevailing in those jurisdictions already alluded to, that these parol licenses are legal and irrevocable, and were to postulate that the license in this instance was given by the appellant, and that the respondents have, in good faith, expended their moneys in reliance upon it, nevertheless it would not seem to us that the respondents would have even the semblance of a stable footing in this case. The reason of this conclusion is this: that the principle that has been supposed to justify the interference of equity in this class of cases is, that without such aid the licensee would sustain irreparable loss. This is the fundamental consideration, infusing with a supposed equity every decision of this class. It is not observed that any court has ever interfered in any instance unless upon the ground to protect the licensee from considerable and irreparable damage.

This essential feature is wanting in the instance now in hand. The revocation of this assumed license could not operate disastrously to the interests of the respondents. The remedy was in their hands; all they had to do was to apply under the meadow act, and they would have obtained, in substance, all the relief that has been afforded them by force of the present decree. There was, on their own showing, no necessity to call a court of equity to their aid. Their remedy at law was complete; it has never heretofore been claimed that a parol license of this nature can be sustained and enforced in a case in which its revocation will work no essential damage to its possessor.

The decree should be reversed, with costs to the appellant in both courts.

PAROL LICENSES — THEIR NATURE AND REVOCATION. — The subject of parol licenses has been treated at considerable length in the notes to *Ricker v. Kelley*, 10 Am. Dec. 40-45; *Rerick v. Kern*, 16 Am. Dec. 501-506; *Haelton v. Putnam*, 54 Am. Dec. 166, 167; and *Johnson v. Skillman*, 43 Am. Rep. 195, 199. It is not the intention of this note to again consider any of the cases referred to in the notes mentioned. The authorities upon this branch of the law have ever been and still remain so conflicting as to make their reconciliation totally impossible upon any conceivable theory. As was well said by the vice-chancellor in *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 243-254, "the adjudications upon this subject are numerous and discordant.

Taken in their aggregate, they cannot be reconciled, and if an attempt should be made to arrange them in harmonious groups, I think some of them would be found so eccentric in their application of legal principles, as well as in their logical deductions, as to be impossible of classification."

Parol License—General Character.—A parol license is founded in personal confidence, and is defined to be an authority given to do some act, or a series of acts, on the land of another, without passing any interest in the land: *Cook v. Stearns*, 11 Mass. 533; *Clark v. Glidden*, 60 Vt. 702; *Houston v. Lafes*, 46 N. H. 505; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248. It is distinguished from an easement, in the fact that the latter always implies an interest in the land upon which it is imposed, and can only be created by deed: *Clark v. Glidden*, 60 Vt. 702. No permanent interest in land by way of easement can be created by parol license: *Selden v. Delaware etc. Canal Co.*, 29 N. Y. 634; *Curtis v. La Grande etc. Water Co.*, 20 Or. 34. Such license may result from circumstances or the ratification of previous acts, as well as from permission expressly given: *Metcalf v. Hart*, 3 Wyo. 513; *ante*, p. 122; *Lakin v. Ames*, 10 Cush. 196; *Martin v. Houghton*, 45 Barb. 268; *Fletcher v. Evans*, 140 Mass. 241; *Cutler v. Smith*, 57 Ill. 252; *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 269; 3 Am. Rep. 628; *Thayer v. Jarvis*, 44 Wis. 388. Thus when a widow is authorized by the heirs at law of her husband to erect a monument in a burial lot owned by him at the time of his death, such authority gives her the right to make any reasonable contract for a monument, and, by implication, a right to give a contractor a license to enter the lot to build the monument, or to remove it if not satisfactory, or if she does not pay for it according to contract: *Fletcher v. Evans*, 140 Mass. 241. A parol license gives the licensee, his servants and agents, authority to do all or any acts necessary to the full enjoyment of the license granted: *Sterling v. Warden*, 51 N. H. 217; 12 Am. Rep. 80; *Willoughby v. Northeastern R. R. Co.*, 32 S. C. 410; *Fletcher v. Evans*, 140 Mass. 241; and it affords a complete protection for all such acts done under it before it is revoked: *Selden v. Delaware etc. Co.*, 29 N. Y. 634; *Adams v. Burton*, 43 Vt. 26; *Murray v. Gibson*, 21 Ill. App. 488; *Occum Co. v. Sprague Mfg. Co.*, 34 Conn. 529; *Purell v. Stover*, 110 Pa. St. 43; *Miller v. Auburn etc. R. R. Co.*, 6 Hill, 61. But it must be exercised only in the manner and for the special purpose for which consent was given, and if exercised in any other manner, the licensee becomes a trespasser: *Dempsey v. Kipp*, 62 Barb. 311; *Lyford v. Putnam*, 35 N. H. 563. A license to enter land for one purpose is no defense to an entry for another and entirely different purpose: *Norton v. Craig*, 68 Me. 275; nor is it a defense to an act negligently done in its performance: *Selden v. Delaware etc. Co.*, 29 N. Y. 634; *McKnight v. Ratcliff*, 44 Pa. St. 156; *Dean v. McLean*, 48 Vt. 412; 21 Am. Rep. 130; nor for acts done after its expiration or revocation: *Glynn v. George*, 20 N. H. 114; *Marston v. Gale*, 24 N. H. 176. A licensee assumes all ordinary risks connected with the performance of his license: *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Metcalfe v. Cunard Steamship Co.*, 147 Mass. 66; *Redigan v. Boston etc. R. R.*, 155 Mass. 44; *ante*, p. 520. A license is a complete answer and defense to a claim of adverse possession set up by the licensee: *Lucas v. Carley*, 24 Wend. 451; 35 Am. Dec. 637; *Blaisdell v. Portsmouth etc. R. R.*, 51 N. H. 483; *Omaha etc. Co. v. Tabor*, 13 Col. 41; 16 Am. St. Rep. 185. It is, however, a personal privilege to the licensee, and is not assignable: *Dark v. Johnston*, 55 Pa. St. 164; 93 Am. Dec. 732; *Mendenhall v. Kinck*, 51 N. Y. 246; *Fuhr v. Dean*, 26 Mo. 116; 69 Am. Dec. 484; *Coney Island etc. R. R. Co. v. Brooklyn R. R. Co.*, 53 Hun, 169; and an assignment by a licensee terminates his right: *Dark*

v. *Johnston*, 55 Pa. St. 164; 93 Am. Dec. 732; nor will a license granted to one pass to his lessee: *Gronendyke v. Cramer*, 2 Ind. 382; *Coney Island etc. R. R. Co. v. Brooklyn R. R. Co.*, 53 Hun, 169. A license must be exercised within a reasonable time, under all the circumstances, or the licensee will lose his right: *Heflin v. Bingham*, 56 Ala. 506; 28 Am. Rep. 776.

Revocation of Unexecuted Licenses. — An executory license which has been created by parol, not yet acted upon by the licensee, or under which he has made no great expenditure of time or money, is always revocable, at the will of the licensor: *Huff v. McCauley*, 53 Pa. St. 206; 91 Am. Dec. 203; *Ellsworth v. Southern etc. Ry Co.*, 31 Minn. 543; *Druse v. Wheeler*, 26 Mich. 189. Thus a parol license, given without consideration, to obstruct the flow of water in a stream, so as to set it back upon the mill machinery of another, may be revoked at any time before it is acted upon: *Williamson v. Fingling*, 93 Ind. 42.

Revocation by Death, Conveyance, Action for Damages, etc. — An executory license created by parol is revoked by the death of the licensor: *Eggleston v. New York etc. R. R. Co.*, 35 Barb. 162; *Vanderburgh v. Van Bergen*, 13 Johns. 212; *De Haro v. United States*, 5 Wall. 599; or by his conveyance of the property upon which the license is to be exercised: *Carter v. Harlan*, 6 Md. 20; *Beck v. Louisville etc. R. R. Co.*, 65 Miss. 172; *Hill v. Lord*, 48 Me. 83; *Jenkins v. Lykes*, 19 Fla. 148; 45 Am. Rep. 19; *Winne v. Ulster County Savings Inst.*, 44 Hun, 349. A subsequent conveyance or leasing of the premises amounts to a revocation of a parol license, unless it is coupled with an interest, or executed: *Kamphouse v. Gaffner*, 73 Ill. 453. So a license to use the water of a spring is revoked by a grant of the land and of the water of the spring: *Eckerson v. Crippen*, 110 N. Y. 585. When one of two adjoining owners grants permission to the other to join fences with him, each to fence upon his own land, the license thus granted is a personal privilege, and a sale of the land by the licensor, without notice to the purchaser, revokes the license: *Houx v. Seat*, 26 Mo. 178; 72 Am. Dec. 202. An executory parol license to back water upon the land of the licensor is revoked by a conveyance of such overflowed land: *Carter v. Harlan*, 6 Md. 20. A parol license by a grantor to the grantee of land for the use of a way along the margin thereof, over other land of the grantor, does not create a right in the grantee which will fix a servitude upon the adjoining land after it has passed to a purchaser who has no notice of the supposed right: *Cox v. Leviston*, 63 N. H. 283. A parol license "is revocable, not only at the will of the owner of the property on which it is to be exercised, but by his death, by alienation or demise of the land by him, and by whatever would deprive the original owner of the right to do the acts in question, or give permission to others to do them": *Hodgkins v. Farrington*, 150 Mass. 19-21; 15 Am. St. Rep. 168. When the owner of land, for a valuable consideration, orally licenses another to cut off the timber thereon within a reasonable time, and subsequently, before the license is executed, conveys the land to a third person, such conveyance, when made known to the licensee, operates as a revocation of the license, although the grantee had notice of it: *Drake v. Wells*, 11 Allen, 141. But when such license has been executed in part, while the conveyance will revoke its further execution, yet it will not deprive the licensee of the right to enter and remove the timber already cut down at the time of the conveyance: *Jenkins v. Lykes*, 19 Fla. 148; 45 Am. Rep. 19; *Douglas v. Shumway*, 13 Gray, 498; *Giles v. Simonds*, 15 Gray, 441; 77 Am. Dec. 373; *Cool v. Peters etc. Co.*, 87 Ind. 531. The commencement of an action for damages, by the licensor against the licensee, for acts exercised

in the execution of a parol license, is a revocation thereof: *Lockhart v. Getz*, 54 Wis. 133. Such license is revoked by an appropriation of the land to any use inconsistent with its enjoyment: *Stimpeon v. Wright*, 21 Ill. App. 67. A parol license to a partnership to mine and raise ore on the land of another is revoked by a dissolution of the partnership before the license is acted upon: *Barksdale v. Hairston*, 81 Va. 764. A verbal license to erect a dam and fish-traps may be revoked at any time after they are swept away by the water, and before they are renewed: *Wingard v. Tift*, 24 Ga. 179. If an aqueduct, erected under a parol license, has so decayed from exposure to the water or otherwise as to have to be rebuilt, to be of any value, the licensor may revoke the license, and put an end to the rights of the licensee: *Allen v. Fiske*, 42 Vt. 462.

Revocation of Executed License. — At common law, a parol license to be exercised upon the land of another creates an interest in the land, is within the statute of frauds, and may be revoked by the licensor at any time, no matter whether or not the licensee has exercised acts under the license, or expended money in reliance thereon. In many of the states this rule prevails, while in others the licensor is deemed to be equitably estopped from revoking the license, after allowing the licensee to perform acts thereunder, or to make expenditures in reliance thereon. These two lines of cases cannot be reconciled; for one of them holds that an interest in land cannot be created by force of a mere parol license, whether executed or not, while the other declares that where the licensee has gone to expense, relying upon the license, the licensor may be estopped from revoking it, and thus an easement may be created. The former line of cases, it seems to us, is founded upon the better reason. They decide that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is revocable, at the option of the licensor, and this, although the intention was to confer a continuing right, and money has been expended by the licensee upon the faith of the license. Such license cannot be changed into an equitable right on the ground of equitable estoppel: *Crosdale v. Lanigan*, 129 N. Y. 605; 26 Am. St. Rep. 551; *Johnson v. Skillman*, 29 Minn. 95; 43 Am. Rep. 192; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Beck v. Louisville etc. R. R. Co.*, 65 Miss. 172; *St. Louis Nat. Stock Yards v. Wiggins etc. Co.*, 112 Ill. 334; 54 Am. Rep. 243; *Tanner v. Volentine*, 75 Ill. 625; *Collins Co. v. Marcy*, 25 Conn. 239; *Wilson v. St. Paul etc. R'y Co.*, 41 Minn. 56; *Wood v. Michigan etc. R. R. Co.*, 90 Mich. 334. A parol license to do a certain act or series of acts on the land of another does not convey any interest in the land, but simply a privilege to be exercised thereon, and although the statute of frauds does not, strictly speaking, apply to such a license, it is in all cases revocable, so far as it remains unexecuted, or so far as any future enjoyment of the easement is concerned, at the will of the licensor, even when the licensee has expended money upon the land of the licensor upon the faith of such license: *Houston v. Laffee*, 48 N. H. 505; overruling many earlier New Hampshire cases, and followed in *Batchelder v. Hibbard*, 58 N. H. 269, where it was said: "The more recent decisions of this state, and the weight of authority, are to the effect that a mere license of this character is always revocable at the will of the licensor, so far as any further enjoyment of the privilege is concerned." In *Crosdale v. Lanigan*, 129 N. Y. 604-610, 26 Am. St. Rep. 551, the court said: "There has been much contrariety of decision in the courts of different states and jurisdictions. But the courts in this state have upheld with great steadiness the general rule that a parol license to do an act on the land of the licensor, while it justifies anything done by the licen-

see before revocation, is, nevertheless, revocable at the option of the licensor, and this, although the intention was to confer a continuing right, and money had been expended by the licensee upon the faith of the license. This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of lands with restrictions founded upon oral agreements easily misunderstood. It gives security and certainty to titles, which are most important to be preserved against defects and qualifications not founded upon solemn instruments. The jurisdiction of courts to enforce oral agreements for the sale of land is clearly defined and well understood, and is indisputable; but to change what commenced in a license into an irrevocable right, on the ground of equitable estoppel, is another and quite different matter. It is far better, we think, that the law requiring interests in land to be evidenced by deed should be observed, than to leave it to the chancellor to construe an executed license as a grant, depending upon what, in his view, may be equity in the special case." A parol license to do an act upon the land of another which may affect the owner in the exclusive use of his property creates an interest in the land, is within the statute of frauds, and revocable at the will of the licensor: *Houghtaling v. Houghtaling*, 5 Barb. 379.

Examples. — In those jurisdictions where the above rule prevails, a parol license to a railroad company to enter upon land and construct its road is revocable at the will of the land-owner: *Wood v. Michigan etc. R. R. Co.*, 90 Mich. 334. The owner of land across which a drain is maintained by virtue of a mere parol license may revoke the license, and proceed to use his land as though the drain were not there, without giving notice to the licensee: *Wilson v. St. Paul etc. R'y Co.*, 41 Minn. 56. The right to flood the land of another, either by the drippings from the roof of a building or otherwise, is an interest in the land, and a verbal license giving such right is within the statute of frauds, and may be revoked at any time: *Tanner v. Valentine*, 75 Ill. 624. So a parol license to erect upon the land of another an addition of a substantial kind to a building is a grant of an interest in land within the statute of frauds, and revocable at the will of the licensor, though expenditures have been made by the licensee: *Collins Co. v. Marcy*, 25 Conn. 238. A mere parol license to construct a railway track over the land of another is within the statute of frauds, as creating an interest in land by parol, and it cannot be enforced in equity even after large expenditures of money made on the faith of it. Hence when a party, under a mere verbal license, enters upon the land of another, and constructs a railway track over it without objection on the part of the owner of the land, but without any agreement for compensation or as to the duration of the easement, the land-owner will not be estopped in equity from revoking the license, even after money has been expended in building the road. The licensee cannot claim that he has been misled or deceived by the licensor, as he must have known that such license was revocable: *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384; 54 Am. Rep. 243. So a parol agreement to allow one railway company to extend its track on the right of way of another company, for the purpose of making a connection, is a mere license, revocable at the will of the licensor, and cannot operate as an estoppel, although the licensee has entered and made valuable improvements: *Richmond etc. R. R. Co. v. Durham etc. R. R. Co.*, 104 N. C. 658. A verbal license to enter upon land for the purpose of constructing a railroad track, not coupled with an interest in the land, may be revoked at will by the party granting it. A right to come upon the property of another and remain there an indefinite time can

be granted only by deed; and when the license is by parol, it may be revoked at any time, even if money is paid for it, and expense incurred in erecting buildings or other permanent improvements on the premises: *Hetfield v. Central R. R. Co.*, 29 N. J. L. 571. A parol license to enter and work a mine on the land of another is a protection against trespass for acts done under it before revocation, but it is revocable at the will of the licensor, as it creates an interest in land within the meaning of the statute of frauds: *Desloge v. Pearce*, 38 Mo. 588; *Kamphouse v. Gaffner*, 73 Ill. 453; *Wheeler v. West*, 71 Cal. 126. A parol license to pass over the land of another is revocable at the will of the party giving it: *Kimball v. Yates*, 14 Ill. 464; *Parish v. Kaspere*, 109 Ind. 586; *Maenner v. Carroll*, 46 Md. 193; *Marston v. Gale*, 24 N. H. 176. Such license may be revoked although a money consideration has been paid for it: *Duinneen v. Rich*, 22 Wis. 524 (*550); and it may be revoked by putting the land to any use inconsistent with the enjoyment of the license: *Simpson v. Wright*, 21 Ill. App. 67. A verbal license by the owner of land to erect thereon a dam which shall flood it is revocable at the pleasure of such owner or his grantee: *Brown v. Woodworth*, 5 Barb. 550; *Stevens v. Stevens*, 11 Met. 251; 45 Am. Dec. 203; *Clute v. Carr*, 20 Wis. 559 (*531); 91 Am. Dec. 442. Such license, whether voluntary or supported by a valuable consideration, may be revoked by the owner without incurring liability in damages, after notice given and reasonable opportunity to remove improvements erected thereunder: *Kiwelt v. McKeithan*, 90 N. C. 106. Verbal license to dig a ditch upon the land of another for the purpose of drainage is revocable at the will of the licensor: *Hitchens v. Shaller*, 32 Mich. 496; *Totel v. Bonnefoy*, 23 Ill. App. 55; 123 Ill. 653; 5 Am. St. Rep. 570; *Stoddard v. Filgin*, 21 Ill. App. 560. So a parol license given by a land-owner to lay an aqueduct through his land may be revoked at will, and a court of equity will not interfere to aid the licensee in the assertion of his right: *Owen v. Field*, 12 Allen, 457; *Allen v. Fiata*, 42 Vt. 462. So a parol agreement for the use of the water of a spring on the land of another is a mere license, revocable at the pleasure of the person granting it, or of his heirs or grantees: *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Taylor v. Gerrish*, 59 N. H. 569.

License, when Irrevocable — Equitable Estoppel. — On the other hand, quite a respectable number of cases directly oppose the doctrine hereinbefore stated. They are based on the ground of equitable estoppel, and maintain that when the licensee has entered under a parol license, and expended large sums of money or made valuable improvements, relying upon the continuance of his license, the licensor will not be allowed to revoke the license at will, because this would work a fraud on the licensee. These cases determine, in effect, that the license, so acted upon by the licensee, creates an interest in the land amounting to a grant of a right or easement which the licensor cannot in equity revoke, or, as some cases hold, cannot revoke until he has made due compensation to the licensee for his expenditures incurred in reliance upon the continuance of the license. In other words, a parol license to use the land of another is not revocable at the pleasure of the licensor when it is given upon a valuable consideration, or money has been expended on the faith that it is to be perpetual or continuous. It is then irrevocable altogether, or cannot be revoked without remuneration, the reason being, that to permit a revocation without placing the other party *in statu quo*, would be fraudulent and unconscionable; and when the license has been so far executed that its revocation would work a fraud, actual or constructive, upon the licensee, equity will restrain such revoca-

tion, although its continuance results in an easement upon the lands of the licensor in favor of the licensee: *Curtis v. La Grande etc. Co.*, 20 Or. 34; *Gibson v. St. Louis Agricultural etc. Ass'n*, 33 Mo. App. 165; *School District v. Lindsay*, 47 Mo. App. 134; *Nowlin v. Whipple*, 120 Ind. 596; *Morton Brewing Co. v. Morton*, 47 N. J. Eq. 158; *Saucer v. Keller*, 129 Ind. 475; *Pierce v. Cleland*, 133 Pa. St. 189; *Southwestern R. R. v. Mitchell*, 69 Ga. 114; *Harrison v. Boring*, 44 Tex. 265; *Clark v. Glidden*, 60 Vt. 702; *United States v. Baltimore etc. Co.*, 1 Hughes O. C. 138; *Baker v. Chicago etc. R. R. Co.*, 57 Mo. 265; *Lane v. Miller*, 27 Ind. 534; *Müller v. State*, 39 Ind. 267; *Snowden v. Wilos*, 19 Ind. 10; 81 Am. Dec. 370; *Messick v. Midland R'y Co.*, 128 Ind. 81; *Campbell v. Indianapolis etc. R. R. Co.*, 110 Ind. 490. A parol license to one to enjoy a permanent privilege upon the land of another is an interest in the land, and within the statute of frauds; but if the licensee, in pursuance of the license, proceeds to make large investments, equity will decree specific performance of the license, on the ground that part performance has taken it out of the operation of the statute of frauds, and that the licensor is equitably estopped from revoking it: *Cook v. Pridgen*, 45 Ga. 331; 12 Am. Rep. 582; *Ransom v. Bell*, 46 Ga. 19.

Illustrations. — A parol license to lay an aqueduct to a spring of water on the land of another is irrevocable during the existence of the aqueduct, and a court of equity, on the ground of equitable estoppel, will protect the licensee in the use of the aqueduct, and will grant an injunction restraining the owner of the spring from interfering with the aqueduct until its decay, for a revocation of the license would operate as a fraud: *Clark v. Glidden*, 60 Vt. 702. A license to throw waste from a mill into a stream flowing through the land of the licensor, such license being obtained under an executed verbal contract founded upon a sufficient consideration, is irrevocable by the licensor or those claiming under him: *Thompson v. McWharney*, 82 Pa. St. 174. A parol license to float spars down a private stream, obtained for a valuable consideration, cannot be revoked by the grantor when the licensee, having acted upon it, would be injured by the revocation. In such case the doctrine of estoppel *in pais* applies: *Rhodes v. Otis*, 33 Ala. 578; 73 Am. Dec. 439. When a railroad company, under parol license from the owner of land, takes possession of the ground necessary for a right of way, and expends money in the construction and maintenance of its line of road thereon, the license cannot be thereafter revoked: *Campbell v. Indianapolis etc. R. R. Co.*, 110 Ind. 490; *Messick v. Midland R'y Co.*, 128 Ind. 81; *Hartono v. Marquette etc. R. R. Co.*, 41 Mich. 336. A parol license, granted for a valuable consideration, to erect a mill-dam, by which the lands of the grantor are overflowed, when executed, or when money has been expended on the faith of it, is irrevocable without remuneration on equitable principles: *Southwestern R. R. v. Mitchell*, 69 Ga. 114; *Olmstead v. Abbott*, 61 Vt. 281; *Lacy v. Arnett*, 33 Pa. St. 169. So a verbal license to erect a dam upon another's land, or to convey water from a stream running through the land of another for the purpose of erecting and conducting a mill, is irrevocable, after the party to whom the license is given has executed it by erecting the mill, or otherwise expended his money upon the faith of the license: *Lee v. McLeod*, 12 Nev. 280. A parol license to build a dam and lay pipes for the purpose of diverting water is, when executed, irrevocable, so long as the dam and pipes remain for the purpose for which they were constructed at the point of diversion orally agreed upon: *Curtis v. La Grande etc. Co.*, 20 Or. 34. A verbal license to enter the land of another, and put a tile ditch thereon, is irrevocable after the licensee has expended money and labor on the faith of

the license: *Saucer v. Keller*, 129 Ind. 475. So a license to construct and maintain a ditch on the land of another for the purpose of draining the land of the licensee is irrevocable after it is acted upon, although it rests wholly in parol, and though unforeseen injuries result to the licensor and his grantee from the construction and use of such drain: *Hodgson v. Jeffries*, 52 Ind. 334; and the licensor may be held liable in damages for digging up the drain on his land, and thus terminating the license: *Ferguson v. Spencer*, 127 Ind. 66. When a party has erected and maintained gates at his own expense upon the faith of a parol agreement that he is to have a perpetual easement to pass over the land of another, and the agreement has been acted upon and fully acquiesced in by the parties for thirty years or more, the license is irrevocable: *Nowlin v. Whipple*, 120 Ind. 598. So a parol grant of a right of way, based upon a valuable consideration, and followed by the use of the way for sixteen years without objection, cannot be revoked: *Nowlin v. Whipple*, 79 Ind. 481. A parol sale of personal property, as a house not annexed to land, by the owner of real estate, which can only be removed by entry thereon, is a license to enter upon the land for the purpose of removing the personal property purchased, and such license is irrevocable: *Rogers v. Cox*, 96 Ind. 157; 49 Am. Rep. 152. When one owner gives verbal permission to an adjoining owner to attach a brick building in the course of erection to the house wall of the former, the license is revocable at any time before it is acted upon; yet after its execution, by the expenditure of money in the erection of the new building, as induced by the permission, the license is irrevocable, on the ground of equitable estoppel: *Russell v. Hubbard*, 59 Ill. 335.

License as Extinguishment of Easement. — A license resting in parol to do that upon the licensee's own land which prevents the further enjoyment by the licensor of an easement in the land, when executed, is irrevocable, and the effect is to extinguish the easement; for it is a well-established rule of law that an easement may be extinguished, renounced, or modified by a parol license granted by the owner of the dominant tenement and executed by the owner of the servient tenement: *Boston etc. R. R. Co. v. Doherty*, 154 Mass. 314; *Mora v. Copeland*, 2 Gray, 302; *Ourtis v. Noonan*, 10 Allen, 406.

O'ROURKE v. CLEVELAND.

[49 NEW JERSEY EQUITY, 577.]

CONTEMPTS — COUNSEL FEES AS PUNISHMENT. — Payment of counsel fees cannot be imposed upon a party as punishment for his contempt of court.

CONTEMPTS — VOID JUDGMENT. — A judgment requiring a party found guilty of contempt of court to pay costs and a counsel fee, and to await further punishment in the pleasure of the court, is void.

CONTEMPTS. — PUNISHMENT FOR CONTEMPT OF COURT cannot be broken up into portions. The judgment inflicting it must be entire and final for the particular contempt.

John W. Taylor, for the appellant.

Joseph D. Bedle, for the respondent.

REED, J. O'Rourke had been enjoined by the court of chancery from blasting rocks by the use of explosives in such

manner as to throw stones or dirt on the land of Cleveland. A petition was filed in behalf of Cleveland, charging O'Rourke with violating this injunction. Upon the hearing, on the return of this petition, it was decreed that O'Rourke had been guilty of violating the decree of the court, and he was adjudged in contempt. It was decreed that he pay the costs of the complainant in the contempt proceeding, also a counsel fee of \$250, and that sentence, by way of fine or imprisonment, be suspended until the further order of the court, and that said O'Rourke appear before this court, when required, for such further order and sentence.

We concur in the view of the vice-chancellor, that there was a violation of the decree of the court of chancery, and that the appellant was properly adjudged to be in contempt. But we are of the opinion that the order thereupon made cannot stand. In the first place, we can find no authority in this state for the imposition of counsel fees upon a person adjudged to be in contempt. Chancellor Haines, in *Magennis v. Parkhurst*, 4 N. J. Eq. 433, ruled that even costs in a proceeding for violating an injunction should not, as a general rule, be allowed to a defendant who successfully purged his contempt, because the proceeding was criminal in its nature. In the only case cited by the chancellor in support of this conclusion, namely, *Rex v. Plunket*, Burr. 1329, the court, while declaring it to be contrary to their general practice, yet, in that instance, gave costs. And in *McDermott v. State*, 10 N. J. L. 63, costs were awarded to a defendant under similar circumstances; and the award of costs, at the discretion of the court, is the settled practice, in courts of equity, in contempt proceedings: *Bowden v. Russell*, 36 L. T., N. S., 177; *Vernon v. Vernon*, 4 L. J. Ch. 118.

But I find no case in which counsel fees have been awarded to a successful litigant in contempt proceedings, aside from two cases in the courts in the state of New York, and one case in the federal court of the northern district of New York. In the state of New York, however, counsel fees are awarded under a statute which permits the court to impose upon a defendant in contempt the costs and expenses in contempt proceedings. A counsel fee, while held not to be a part of the costs, is held to be embraced within the term "expenses": *Davis v. Sturtevant*, 4 Duer, 148; *Clark v. Barnes*, 76 N. Y. 301; 32 Am. Rep. 306. The federal case, obviously following the practice of the state courts, is *Doubleday v. Sherman*, 8 Blatchf.

45. The power to award a counsel fee is purely statutory. No legislative authority in this state can be discovered which permits it in this class of proceedings. The chancery act (Rev., p. 125, sec. 113) confers power upon the chancellor to allow a counsel fee, instead of a retaining fee, to be included in the bill of costs. But this section is inapplicable to the present proceedings, — 1. Because the section mentioned, as amended (Rev., p. 127, sec. 122), can apply only to decrees for the payment of money; and 2. Because no retaining fee could have been taxed in a contempt proceeding, and so there would exist nothing for which a counsel fee could be substituted.

We think that the order is irregular in another particular. The order was to pay costs and counsel fees, but the defendant was left in suspense as to whether any further punishment was to be inflicted, and he was decreed to hold himself in readiness to appear, upon order, for such order and sentence as might seem meet to the court. I do not think that a punishment for a contempt can be broken up into portions. If the court undertakes to adjudge a punishment at all, the judgment must be entire and final for the particular contempt.

Nor does it seem conformable to the provisions of section 103 of the chancery act, that a party who has been adjudged to be in contempt shall be permitted, by future conduct, to evade the payment of the fine mentioned in that section.

The decree is reversed.

CONTEMPT. — CONVICTIONS FOR CONTEMPT, WHEN VOID: See note to *Ex parte Starnes*, 11 Am. St. Rep. 256; see also note to *Morrill v. Morrill*, 23 Am. St. Rep. 109. When a superior court imposes a fine upon an attorney for contempt, and further order that he purge himself of the contempt, and after the fine is paid makes a other order, suspending the attorney from practice in said court until he has purged himself of the contempt by apologizing, the supreme court can, by a writ of *mandamus*, compel said court to vacate and set aside its order of suspension. The latter part of the first order, if it required more than the payment of the fine, required more than the court had a right to order, and was absolutely void, and could furnish no foundation for the proceedings which led to the second order, which was therefore absolutely void as an entirety: *State v. Sacks*, 2 Wash. 373; 26 Am. St. Rep. 857.

AM. ST. REP., VOL. XXXI.—46

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

JONES v. ERIE AND WYOMING VALLEY R. R. Co.

[151 PENNSYLVANIA STATE, 30.]

STREETS — OCCUPATION OF, BY RAILROAD — NEW SERVITUDE. — When the state authorizes the construction of a railroad upon a line which makes it necessary to cross one or more public highways or streets, the grant is subject to two limitations, — one in favor of the public for the preservation of the way; the other in favor of the land-owner, requiring no additional servitude to be imposed upon the land covered by the public easement without compensation.

STREETS — OCCUPATION BY RAILROAD — ADDITIONAL SERVITUDE. — The authorized construction of a railroad upon a public street, which injuriously affects the adjacent owner by interfering with the access to or drainage from his property, or the exclusion of light and air therefrom, imposes an additional servitude for which he may recover damages.

STREETS — OCCUPATION OF, BY RAILROAD — ADDITIONAL SERVITUDE — DAMAGES. — When a railroad company owns the diagonal corners on public streets, and is authorized by the city to connect them by an overhead bridge, which the company places on abutments twenty-three feet high, built upon its own land, the adjoining owner upon one of the remaining corners is entitled to recover damages for any additional servitude thus imposed upon his property, as for the exclusion of light and air therefrom, but he is not entitled to recover on the ground that his property is diminished in value by the use to which the railroad company puts its property; nor is he entitled to recover for the mere exposure of his property to the noise, smoke, dust, and danger from his horses or those of his visitors becoming frightened by moving trains.

STREETS — OCCUPATION OF, BY RAILROAD. — EXPERT EVIDENCE is not necessary to determine the value of city property as affected by the occupation of a street by a railroad. All persons familiar with the property, who have formed an opinion, are competent to testify as to its value.

STREETS — OCCUPATION OF, BY RAILROAD — ADDITIONAL SERVITUDE. — Mere exposure to danger of horses being frightened by passing trains twenty-three feet above the surface of the street is not an obstruction to access to adjoining property, nor the imposition of a new servitude for which the adjoining owner is entitled to recover.

STREETS — OCCUPATION OF, BY RAILROAD — ADDITIONAL SERVITUDE. — The mere proximity of a railroad in the street may render adjoining dwelling-houses less desirable without imposing any liability on the railroad company for the loss sustained by their owners. Such proximity of the road, so that the noise of passing trains can be heard, or the dust and smoke therefrom be noticeable, imposes no additional servitude.

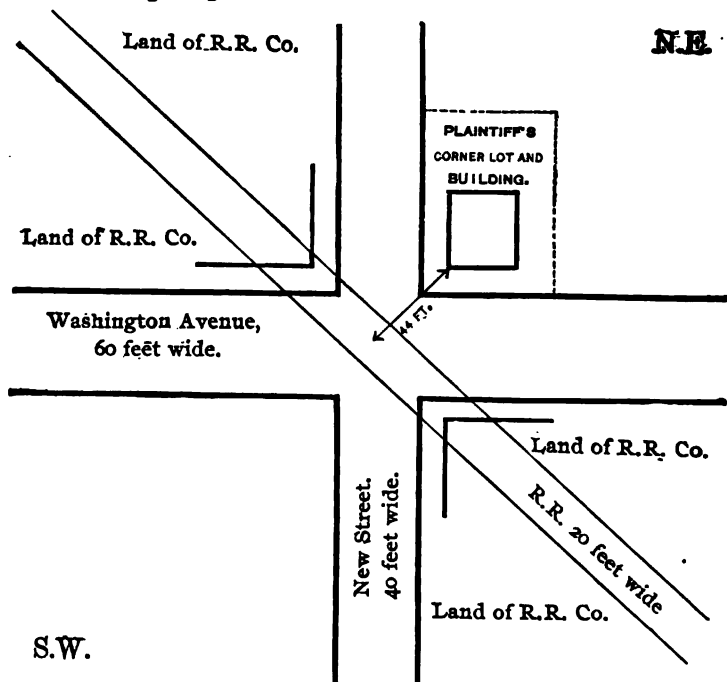
SERVITUDES — USE OF PROPERTY. — The use to which a railroad company puts its city property by building abutments thereon imposes no additional servitude on the property of an adjoining owner, although it may diminish its market value.

Everett Warren and Edward N. Willard, for the appellant.

S. P. Price and H. M. Hannah, for the appellee.

WILLIAMS, J. This appeal presents several important questions. One of these does not seem to have arisen heretofore in this state. In New York, and some other of our sister states, it has been considered and decided; but these decisions are influenced by the legislation peculiar to the jurisdiction in which they have been made, and are not as helpful as under other circumstances they might be. In the case now before us we have the following facts: The plaintiff, Jones, is the owner of a piece of land lying in the northeast corner made by the crossing at right angles of Washington Avenue and New Street, in the city of Scranton. His front upon Washington Avenue is sixty-three feet, and upon New Street ninety-five feet. In the corner standing back a few feet from the streets he has a double dwelling-house, and he has one or more dwelling-houses farther out New Street. The southeast corner, which is directly across Washington Avenue from the plaintiff's double house, is owned by the defendant company, as is the northwest corner, which is directly across New Street. On each of these corners it has erected a substantial stone abutment about twenty feet high, upon which it supports an iron bridge eighteen feet wide, that spans the intersection of the streets below in a diagonal direction. This bridge is an overhead crossing for the defendant's line of railroad, and the tracks upon it are about twenty-three feet above the surface of the streets below. The center of the bridge is about twenty-seven feet from the corner of plaintiff's lot, and about forty feet from the nearest corner of his double dwelling-house. The right of way of the railroad company, as the law would define it, would reach over upon the corner of the lot about three feet and overhang a triangular piece of ground beyond the street lines having that depth at the corner. The defendant has,

however, released its right to this corner, and defined the extent of its right of way so as to exclude therefrom any portion of the plaintiff's land outside the streets over which its bridge is suspended. The situation of the plaintiff's land and double dwelling-house, of the defendant's abutments, bridge, and right of way as now defined, and of the streets, is shown by the following diagram:—



After the overhead crossing was completed and occupied by the defendant, this suit was brought to recover consequential damages, which he alleges he has sustained by reason of the construction and use of it. The defendant denies the right to a recovery, alleging, first, that it has taken, injured, or destroyed no portion of the plaintiff's property in the construction of its crossing; and next, that it has a clear legal right to operate its line of road in the manner contemplated by its charter, and commonly employed by railroad companies without liability therefor.

The first of these positions makes it necessary to inquire into the nature and extent of the title which the defendant acquired in these public streets by virtue of its charter, and the consent of the city of Scranton to construct an overhead

crossing at this point. It is well understood that when the state enters upon the land of a private owner by virtue of its right of eminent domain for the purpose of laying out a public highway, it acquires an easement in and upon the land so entered for the purpose of public travel. The injury, if any, which the owner suffers is estimated in damages, and compensation is made him. The highway so opened passes under the care of the municipal division of the state in which it is located. The fee remains in the former owner, but is bound by the servitude which the entry by the commonwealth imposed, so that the owner cannot interfere with the free use by the public of the land appropriated to the highway; nor can he assert his title to, or exercise any control over, such land in hostility to the public use or easement. The title to the highway is in the commonwealth, as the representative of that portion of her citizens interested in its use. The duty to maintain it and to protect the public in its use rests on the municipality. The public easement is broad enough to include the various modes of travel in common use, and to admit such new and improved modes as the public may adopt, subject only to this necessary limitation, that the new modes adopted must not be destructive of or inconsistent with the use of the highway for the purposes and in the manner for which it was intended, nor with the municipal control over it.

Now, when the commonwealth authorizes the construction of a railroad upon a line which makes it necessary to cross one or more public highways, it authorizes its grantee, by a necessary implication, to enter and use such highways for such purpose. This grant is, however, subject to two limitations, — one in favor of the public, as already stated, for the preservation of the way; the other in favor of the owner, which requires that no additional servitude shall be imposed upon the land covered by the public easement. If the first limitation be violated so that the way is lost to the public, another must be provided to take its place. If the second be violated so that the owner is subjected to new and additional burdens, he is entitled to compensation for the injury actually sustained. It follows that the railroad company desiring to cross the streets of a city must apply to the city for leave, and for the conditions deemed necessary to secure the public convenience and safety. This being done, the railroad company may lawfully enter upon and cross a public highway without

liability, so long as it complies with the terms imposed by the municipality, and keeps within the limits already stated: *Struthers v. Dunkirk etc. R'y Co.*, 87 Pa. St. 282; *Snyder v. Pennsylvania R. R. Co.*, 55 Pa. St. 340; *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325; 94 Am. Dec. 84. If it exceeds these limits, and imposes a new servitude on the land occupied by the public easement, the owner is entitled to compensation, and under some circumstances may recover the land itself. In *Phillips v. Dunkirk etc. R. R. Co.*, 78 Pa. St. 177, the track of the railroad had been located upon a public road, and occupied it longitudinally for some considerable distance

The easement of the public for purposes of travel was thus rendered useless, and the way abandoned in consequence. A new road was built by the railroad company to take its place, which was accepted and used by the public, and the occupancy of the highway was thus settled for, so far as the public was concerned. After this was done, the owner of a farm lying along one side of the road ~~so~~ abandoned to the railroad company brought an action of ejectment against the company to recover a strip of land representing one half of the land covered by the highway as it was opened and traveled before the railroad took possession of it. He was allowed to recover. He owned to the center of the road, subject to the public easement. The railroad company entered under the protection of that easement, but, once in possession, its use soon became inconsistent with and destructive of the easement, so that the public was compelled to abandon it. The land was thus relieved from the burden imposed by the highway, and the owner was at liberty to assert his title against any one found in possession.

But it is not necessary that the public easement should be destroyed, to enable the owner to recover for an additional servitude imposed upon his land. Among the more recent of the cases in which this doctrine has been recognized and applied are *Pennsylvania R. R. Co. v. Duncan*, 111 Pa. St. 354; *Pennsylvania etc. R'y Co. v. Walsh*, 124 Pa. St. 544; 10 Am. St. Rep. 611; *Pennsylvania etc. R'y Co. v. Ziemer*, 124 Pa. St. 560. In Walsh's case and in Duncan's case the ground of recovery was, that the railroad, while wholly within a public street, was so located as to interfere with access to the plaintiff's buildings, and practically cut them off from the highway. In Ziemer's case the railroad was upon the street, but it was so constructed as to obstruct the drainage from his premises.

In each case a new servitude had been imposed upon the land occupied by the street, which injuriously affected the adjacent owner, by interfering with the access to or drainage from his property; and for the injury sustained by reason of such additional servitude, he was allowed to recover damages.

In the case before us we have a new state of facts. The defendant entered upon the intersection of Washington Avenue and New Street by virtue of the implied permission afforded by its charter, and the express permission of the city of Scranton.

But, as we have seen, the permission of the city may be conditioned upon the compliance by the railroad company with such terms as may be deemed necessary to protect the public in its use of the streets. A crossing at grade has come to be regarded as dangerous to the public. Municipal governments now very generally refuse permission to make them, where it is reasonably practicable to make the crossing underground or overhead. In this case the city of Scranton required, at least it authorized, the crossing by means of an overhead bridge. The street over which it had control was upon the surface, but the easement for public travel affected the underlying strata by imposing upon them a servitude to the surface for the support of the way. It affected the open space overhead by imposing a servitude for the supply of air and light to the public while using the way. The owner of the surface upon which the way was opened could neither undermine nor overhang it without municipal consent, for the servitude imposed by the existence of the highway follows his title upward and downward from the surface so far as may be necessary for the safety and convenience of the public; and the owner is precluded from the exercise of acts of ownership in hostility to or inconsistent with the servitude so imposed. The permission of the municipality to cross or enter upon one of its streets, whether upon the surface, or above or below it, is an authority to the grantee to enter within the limits affected by the public easement, and in subordination to it. The grantee may lawfully enter under this permission, but his rights are subject to the same limitations that have been already pointed out. He must impose no new servitude upon the land. If he does, he takes not only what the municipality had to grant, but he takes from the owner in addition. In such case, as we have seen by the cases already cited, the

owner is entitled to compensation for the new servitude to which he is subjected.

The defendant has not disturbed the public easement of travel, for it carries its railway and its trains twenty-three feet above the surface of the streets; and so far as its bridge overhangs the way, the city has authorized it to be done. The public have therefore no ground for complaint; but the question remains, whether this overhead crossing imposes a new servitude on the surface which is injurious to the plaintiff's property. This crossing is, in effect, a new and distinct way. It is suspended over that which the public occupy on the surface. The public has no right in it, but one who goes upon it without the consent of the defendant is a trespasser. It is built for the exclusive use of the defendant corporation, in the movement of its trains by means of locomotive-engines. It invades space which belongs to the plaintiff, subject to the servitude which the existence of the way upon the surface imposes. If the streets should be abandoned by the public, or vacated by a decree of the court of quarter sessions, this structure would remain unaffected thereby. The extinguishment of the public easement would remit the plaintiff to all his rights as an owner, but he could not exercise them. If he should attempt to build upon his land, the bridge would intercept his operations. These facts are not denied, and their legal value may be determined by the courts. They show the imposition of a new servitude upon the surface for the exclusive benefit of the defendant. The plaintiff's property is in the built-up part of a growing city. The possibility of the vacation of these streets may be so remote as not to be worth considering; but the extent to which the new servitude really injures the property is a question for the consideration of the jury.

This brings us to the question of the measure of damages. The plaintiff's declaration as filed contained two counts. One of these charged a trespass *quare clausum fregit*. The other proceeded upon the theory that consequential damages were alone recoverable, and claimed that these were the result of the construction of the abutments, of the construction of the bridge, and of the operation of the defendant's railroad upon and over the bridge. The first count was abandoned at the trial, and the plaintiff rested his right to recover on the second. He claimed that the erection of the abutments and of the bridge excluded light and air from his premises; that the

operation of the railroad made great noise, confusion, dust, and smoke, and exposed his premises to danger from fire, thereby affecting the comfort and security of the double dwelling-house; and that the construction and operation of the railroad over the elevated crossing obstructed the streets and made the approach to his premises difficult and dangerous. All the questions thus raised were allowed to go to the jury, and the verdict affords reason to think that they were all considered in making up its amount. But the abutments were not in the highway. They were built on the land of the defendant, and were lawful structures. The plaintiff may have preferred that dwellings should have been erected on these lots, and his own property may have been rendered less desirable and less valuable because of the use the defendant made of them; but the plaintiff had no cause of action on that account. So far, therefore, as the depreciation in the value of his property is due to the absence of dwellings on these lots, and to the presence of the solid stone abutments that face the double dwelling on both fronts, the jury should have been told to disregard it.

The alleged obstruction to access to the plaintiff's premises was not supported in the least degree by the evidence. There was in fact no pretense that any obstruction existed in the streets or on the surface; but it was alleged on the trial that horses might take fright at the passage of trains over the bridge twenty-three feet above the surface, and that persons who would otherwise come to the plaintiff's double dwelling with wagons or carriages might be deterred from coming, by fear that their horses would be frightened by trains on the overhead crossing and become unmanageable. This is not an obstruction to access. It is too well settled to need a citation of authorities, that mere exposure to noise, smoke, dust, and the danger of horses becoming frightened by a moving train is not an actionable injury. Such an exposure is an inconvenience, and sometimes a source of danger, to all persons who live near a railroad, or who have occasion to travel along a street that is crossed by one. Such an inconvenience or danger is common to many persons, but special to none. It may be greater to those who live or do business near the line of the road, but it affects all who have occasion to come near it, or pass along it, or over or under it. It is the same in kind, though greater in degree, as the inconvenience arising from the noise, confusion, and dust incident to travel upon a

paved street or a common highway. It is the necessary result of the lawful operation of a railroad, and part of the price paid by society for the increased speed and convenience in the transportation of persons and property which it affords. This subject should have been withdrawn from the jury. There was no actionable interference with access to plaintiff's property.

It is urged that the new constitution requires a different holding, and that *Pennsylvania R. R. Co. v. Duncan*, 111 Pa. St. 354, and the cases following it, have so determined. We do not think so. The constitution makes the person or corporation exercising the right of eminent domain liable to make "just compensation for property taken, injured, or destroyed by the construction or enlargement of their works." Property is "taken" by an entry upon and an appropriation of it as in the ordinary case of location. It is "injured" by obstructing access, as in *Duncan's* case, or drainage, as in *Ziemer's* case. It is destroyed, although not touched directly, when the result of construction is to prevent its use, as in *Monongahela Navigation Co. v. Coons*, 6 Watts & S. 101. The injury results in these cases from the construction of the works of the corporation. But in the case of a valuable country hotel, the business of which was destroyed by the change of travel from wagons to trains as the result of the operation of a railroad, the plaintiff was held to be remediless, although the value of his property was destroyed. In many instances business has been diverted from towns and villages, and the value of property therein seriously impaired, as a result of the operation of a railroad through or near them, but the owners of such property have no cause of action against the railroad company on that account.

The expression of the chief justice in *Walsh's* case, on which so much reliance seems to be put, was intended to express, and we think does clearly express, a very different thought. The injury complained of in that case was an obstruction in the way of access to the building. The building was upon a street corner. The tracks of the railroad were laid close to the curbstone on one of the streets on which the building fronted, and directly across the other. The defense was, that the rails were laid on the same grade with the pavement, and that the pavement had been relaid with belgian blocks between the rails and on each side of the track, so that the railroad presented no obstruction to the use of the street

for carriages. We said, in reply, that the word "construction" included not only the movement of earth, and the laying down of rails upon a road-bed, but the character and purpose of the structure. Two parallel iron rails, in themselves considered, might present little or no obstacle in the way of access to the building; but the structure was a railroad, built for the purpose of moving trains of cars by means of locomotive-engines; and whether it obstructed access or not, depended, not merely on the position of the rails, but also upon the use for which they were intended. Not to take the use of the rails into consideration, the chief justice well said would be to take too narrow a view of the constitutional provision. The business authorized by the charter of a railroad corporation is the carriage of persons and goods. The work of construction is provided for as an indispensable preliminary. A road must be built before it can be operated. The manner and the purpose of construction are to be considered in determining questions relating to damages; but in the operation of its road, a company is liable only for negligence or malice. Smoke, dust, and noise are the usual, and in the present state of knowledge on the subject the necessary, consequences of the use of steam and the movement of trains, just as noise and dust are the consequences of the movement of drays and carts over an ordinary highway. The resulting inconvenience and discomfort are in both cases *damnum absque injuria*: *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. St. 472; 2 Am. St. Rep. 618; *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541; 4 Am. St. Rep. 659.

We are thus brought to the conclusion that the plaintiff's cause of action rests on the new servitude imposed by the construction of the overhead crossing, and the damage he sustains in consequence. The company had the right, under its charter and the municipal consent, to enter and cross the highway without liability to the plaintiff, provided it could do so without subjecting his property to any servitude which the public easement then existing did not impose. But the elevated crossing overhanging so much of his land as is covered by the highway does, to some extent, impose an additional servitude upon his property. While the streets remain on the surface, the use of the space above them by the defendant does not interfere with the plaintiff's use of his property that is subject to the public easement; and the probability of the vacation of the streets in the built-up part of the city is so

slight as scarcely to deserve consideration. But if this elevated crossing does to any appreciable extent exclude light and air from the double dwelling, or affect the value of his property by reason of any additional servitude imposed upon it, for the injury so sustained the plaintiff may recover, because such injury is the result of the construction of the defendant's railroad.

Little need be said of the remaining assignments of error. Several of them are directed against the admission of witnesses to speak of the value of the plaintiff's property and its depreciation. The appellant contends that expert testimony is needed to determine the value of city property, but we have not so held. The value of a house or a piece of ground is a subject upon which all persons familiar with the property who have formed an opinion are competent to speak. The value of their opinions will depend on the extent of their familiarity with surrounding property and the prices asked and paid for it, but this is for the jury to determine: *Pennsylvania etc. R. R. Co. v. Bunnell*, 81 Pa. St. 414; *Curtin v. Nittany Valley R. R. Co.*, 135 Pa. St. 20. These assignments are not sustained.

The ninth assignment is to the action of the learned judge in submitting to the jury the question whether the overhead crossing presented an actual obstruction to access to the plaintiff's property. There was no evidence of the existence of any such obstruction, unless mere exposure to the danger of horses being frightened by passing trains twenty-three feet above the surface of the highway was such an obstruction. As it is well settled by the cases already cited that it is not, the question should not have been submitted.

Nor was the amount of the verdict to be fixed by a comparison of the value of the plaintiff's property before the defendant's railroad was built, and after. The occupation of the corners fronting his own across Washington Avenue and New Street may have affected the value of his property quite seriously. So might the erection of a brewery, or a livery-stable, or a factory upon the same corners; but the plaintiff would have been without remedy. So the mere proximity of a railroad, with its burden of traffic, may render dwelling-houses less desirable, and diminish their market value, without imposing any liability on the railroad company for the loss sustained by their owners. The inquiry in this case should have been confined, as we have already seen, to the injury inflicted by means of the additional servitude imposed upon the plain-

tiff's property by the defendant corporation. The building of abutments on its own land imposed no servitude on that of the plaintiff. The mere proximity of its road, so that the noise of passing trains could be heard, or the dust and smoke therefrom be noticeable, imposed no servitude. The only legal ground of complaint grows out of the overhanging of so much of the land to which the plaintiff has title as is occupied at the surface by the streets. This is a new servitude, which, standing apart from all other considerations, except such as grow legitimately out of the character of the bridge and its effect upon the plaintiff's dwelling and lot, constitutes the ground for a recovery. The question is, What has the defendant added to the public easement? What new burden has it put upon the plaintiff's property by overhanging the intersection with its bridge? The answer furnishes the correct measure of the plaintiff's injury, and of his right to compensation.

The judgment of the court below is now reversed for the reasons given in the foregoing opinion, and a *venire facias de novo* awarded.

RAILROAD COMPANIES — OCCUPATION OF CITY STREETS. — That the construction of a steam-railroad in a street is the imposition of an additional servitude thereon, see cases cited in the note to *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 612. Later cases to the same point are *Hodges v. Seaboard etc. R'y Co.*, 88 Va. 653; *Burkham v. Ohio etc. R'y Co.*, 122 Ind. 344; *Rosenthal v. Taylor etc. R'y Co.*, 79 Tex. 325 (a case where drainage was interfered with). If a member of a city council votes for an ordinance authorizing a railway company to construct its road in a street, his assent is referable only to the public easement, and not to his own private rights of property: *Lamm v. Chicago etc. R'y Co.*, 45 Minn. 72. The rights and interest of an abutting owner must be obtained by his express consent, or by the exercise of eminent domain: *Theobald v. Louisville etc. R'y Co.*, 66 Miss. 279; 14 Am. St. Rep. 564. The rule that compensation need not be made to an abutting owner, if the fee is in the city, is illustrated by numerous cases collected in the note to *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 613. But this rule is to be taken with the qualification that the company is liable in damages if the access of the abutting owner to his land is obstructed: *Fobes v. Rome etc. R. R. Co.*, 121 N. Y. 505; *Reining v. New York etc. R'y Co.*, 128 N. Y. 157; *Kansas etc. R'y Co. v. Mahler*, 45 Kan. 565; *Herrdon v. Kansas etc. R'y Co.*, 46 Kan. 560. In New York it is held that the erection and operation of an elevated railroad is an interference with the beneficial enjoyment of his easements in the street on which his property fronts, though he has no title therein: *Abendroth v. Manhattan R'y Co.*, 122 N. Y. 1; 19 Am. St. Rep. 461; *Bokm v. Metropolitan etc. R'y Co.*, 129 N. Y. 576.

RAILROAD COMPANIES — DAMAGES FOR INJURIES TO PROPERTY OF ABUTTING OWNER. — If the abutting owner is merely inconvenienced, or suffers

some remote consequential injury, by the construction of a railroad along the street, it is *damnum absque injuria*: *Fullon v. Short Route R'y etc. Co.*, 85 Ky. 640; 7 Am. St. Rep. 619; *Pennsylvania Co. v. Pennsylvania etc. R. R. Co.*, 151 Pa. St. 334; *post*, p. 762; the general rule being, that where a public use authorized by law takes no land of an individual, but merely affects him by its proximity, the necessary annoyances of that use furnish no basis for damages: *American Bank Note Co. v. New York etc. R. R. Co.*, 129 N. Y. 252. An abutting owner, however, may recover for the damages caused by the darkening and pollution of the air of the street by the smoke, dust, cinders, etc., proceeding from the railroad, even though the fee of the street is in the city: *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644; citing and approving *Story v. New York etc. R. R. Co.*, 90 N. Y. 122; 43 Am. Rep. 146, and *Lahr v. Metropolitan etc. R'y Co.*, 104 N. Y. 268. So, also, in *Omaha etc. R. R. Co. v. Janacek*, 30 Neb. 276, 27 Am. St. Rep. 399, it was held that where an abutting owner has sustained special damages by the construction and operation of a railroad near his land, in excess of the damages sustained by the public generally, he is entitled to recover compensation therefor, and that the noise, jar to his house, smoke, soot, and cinders from passing trains are proper elements of damage.

RAILROAD COMPANIES — VALUE OF PROPERTY, HOW PROVED. — That familiarity with the property to be valued qualifies a witness to express a judgment as to the value of property, see *Hangen v. Hachmeister*, 114 N. Y. 566; 11 Am. St. Rep. 691; *Burlington etc. R'y v. White*, 28 Neb. 166; *Nevada etc. R. R. Co. v. De Lissa*, 103 Mo. 125; *Minnesota etc. R'y etc. Co. v. Gluck*, 45 Minn. 463; *San Antonio etc. R'y Co. v. Ruby*, 80 Tex. 172. For other cases, see note to *Leroy etc. R'y Co. v. Hawk*, 7 Am. St. Rep. 566. On the question of the competency of witnesses to give an opinion directly as to the amount of damages which may be recovered, there is a conflict of authority. In *Railway v. Combs*, 51 Ark. 324, the court took the ground that as the opinion of a witness is admissible to prove the value of a tract of land before and after the construction of a railroad through it, he may also state to what extent, in his judgment, the land is damaged by the right of way, the amount of damages recoverable being merely the difference between the two values, and that being obtained by simple computation. Compare *Durham etc. R. R. Co. v. Trustees*, 104 N. C. 525. On the other hand, in *Mortimer v. Manhattan R'y Co.*, 129 N. Y. 81, it was held that a question addressed to an expert, asking him to give his opinion as to the extent to which the rental value of the property was diminished by the construction of an elevated track and the passage of trains thereon, was objectionable, as seeking to substitute the opinion of the witness for the judgment of the jury. To the same effect are *Thompson v. Pennsylvania R. R. Co.*, 51 N. J. L. 42, and *Chicago etc. R. R. Co. v. Muller*, 45 Kan. 85. Where a witness is allowed to testify as to the amount of damages, he is not required to state the reasons or grounds on which he bases his estimate, but may be asked for such reasons by the party calling him, or may be cross-examined as to them by the opposing counsel: *Ramo v. Varni*, 81 Cal. 289.

CAMPBELL v. SHERMAN.

[151 PENNSYLVANIA STATE, 70.]

SURETYSHIP. — FAILURE OF CREDITOR TO REVIVE JUDGMENT does not release a surety, in the absence of an express agreement that such judgment should be kept revived for his benefit.

SURETYSHIP — WHAT CREATES. — A bond with warrant of attorney to confess judgment, given to secure payment of judgments assigned to the obligee, and expressly providing that it is to remain in force until the whole sum is paid, creates a contract of suretyship on the part of the obligor, and does not constitute him a mere guarantor.

SURETY AND GUARANTOR — DIFFERENCE BETWEEN. — A contract of suretyship creates a direct liability to the creditor for the act to be performed by the debtor, but a contract of guaranty creates a liability only for his ability to perform such act. A surety is an insurer of the debt, while a guarantor is only an insurer of the solvency of the debtor.

J. G. Scouten, for the appellant.

E. M. Dunham, for the appellee.

McCOLLUM, J. On the 1st of January, 1887, J. A. Homet, the appellant, bought of Adam Sherman two judgments against A. R. Robbins, on which there was then an unpaid balance of \$592.38, and they were duly assigned to him. At the same time he loaned to Sherman \$266.62. To secure the payment of the judgments and the money loaned, he received the bond of Sherman in the sum of \$859, on which, by virtue of the warrant of attorney contained therein, judgment was entered January 3, 1887. On a distribution of the proceeds of a sale by the sheriff on the 13th of September, 1890, of the real estate of Sherman, the appellant claimed to apply on his judgment the fund remaining after paying costs and prior liens. The subsequent lien creditors of Sherman admitted that the appellant was entitled to receive the sum loaned, with interest thereon, but contended that Sherman was released from liability as to the balance, because of the appellant's failure to revive the Robbins judgments. To this the appellant answered that his omission to revive these judgments did not release Sherman, and that if it did the creditors could not take advantage of it on distribution. The conclusion reached by the learned auditor was, that he could not, at the instance of the lien creditors, set aside or disregard the judgment on the showing before him, but that Sherman might, in an appropriate proceeding, rely on the appellant's negligence as a defense to it. The learned president of the common pleas thought that this defense could be successfully made before the au-

ditor by the lien creditors, and the fund was accordingly awarded to them.

In reviewing the decision of the court below, the first important inquiry is, whether the obligation of Sherman in respect to the Robbins judgments was that of a surety or of a guarantor. If he was a surety, he was not released from liability by the negligence of the appellant, and the contention concerning the powers of the auditor has nothing to rest upon. It is well settled that mere forbearance, however prejudicial to a surety, will not discharge him, and that the failure of a creditor to revive a judgment does not release the surety, unless there was an express agreement that it should be kept revived for his benefit: *Winton v. Little*, 94 Pa. St. 64; *United States v. Simpson*, 3 Penr. & W. 437; 24 Am. Dec. 331. We think the undertaking of Sherman was that of a surety. His bond included the money loaned and the balance due on the Robbins judgments, and by its express terms was to remain in force until the whole sum was paid. The written conditions in the bond define the liability of the obligor, and we cannot add to them, by implication, a condition which would render them nugatory. The written condition applicable to this contention is, that if the judgments "shall be paid in full by the said A. R. Robbins, his heirs and assigns, to the said J. A. Homet, then this obligation to be void, otherwise to be and remain in full force and virtue." The appellant purchased the judgments on the agreement of his vendor to pay them if Robbins did not. It was a contract of suretyship, and not of technical guaranty, on which he parted with his money. On the failure of Robbins to pay the judgments at maturity, he was at liberty to proceed directly against the surety. He was not bound to resort to legal proceedings against Robbins, or to show that they would have been unavailing, in order to sustain process upon the bond. He was under no legal duty to the surety to revive the judgments, unless requested to do so; and as no such request was made, negligence in this particular cannot be imputed to him.

The law on this subject is stated by Agnew, J., in *Reigart v. White*, 52 Pa. St. 440, as follows: "A contract of suretyship is a direct liability to the creditor for the act to be performed by the debtor, and a guaranty is a liability only for his ability to perform this act. In the former the surety assumes to perform the contract of the principal debtor if he should not; and in the latter the guarantor undertakes that his principal can

perform,—that he is able to do so. From the nature of the former, the undertaking is immediate and direct that the act shall be done, which, if not done, makes the surety responsible at once; but from the nature of the latter, non-ability—in other words, insolvency—must be shown.” In *Kramph's Ex'x v. Hatz's Ex'rs*, 52 Pa. St. 525, Woodward, C. J., discussing the same subject, said: “The contract of a guarantor is to be carefully distinguished from that of a surety; for whilst both are accessory contracts, and that of a surety in some sense conditional, as that of a guarantor is strictly so, yet mere delay to sue the principal debtor does not discharge a surety. The surety must demand proceedings, with notice that he will not continue bound unless they are instituted: *Cope v. Smith*, 8 Serg. & R. 110; 11 Am. Dec. 582. By his contract he undertakes to pay if the debtor do not,—the guarantor undertakes to pay if the debtor cannot. The one is an insurer of the debt; the other an insurer of the solvency of the debtor. It results, as a matter of course, out of the latter contract, that the creditor shall use due diligence to make the debtor pay; and failing in this, he lets go the guarantor.” The foregoing extracts from the opinions of eminent Pennsylvania jurists draw with remarkable clearness and precision the distinction between a contract of suretyship and a contract of guaranty, and accurately define the respective rights and obligations of a surety and a guarantor. There has been no departure by this court from the principles announced in them, and they sustain the contention of the appellant that his omission to revive the Robbins judgments did not affect Sherman's liability on his bond. It follows that it was error to award the fund to the subsequent lien creditors.

Decree reversed, and record remitted to the court below, with direction to distribute the fund in accordance with this opinion. The costs of this appeal to be paid by the appellees.

SURETYSHIP.—RELEASE OF SURETY BY INDULGENCE OF PRINCIPAL: See note to *Okie v. Spencer*, 30 Am. Dec. 257, 258. Release by accepting non-negotiable note of principal: See note to *Lindeman v. Rosenfeld*, 33 Am. Rep. 85, 86. Unless there is an agreement binding upon the creditor to give time to the principal debtor, the surety is not discharged by forbearance to sue: *Sneed v. White*, 3 J. J. Marsh. 525; 20 Am. Dec. 175; *Smith v. Tunno*, 1 McCord Eq. 443; 16 Am. Dec. 617; *United States v. Simpson*, 3 Penr. & W. 437; 24 Am. Dec. 331; nor by mere indulgence: *Burke v. Cruger*, 8 Tex. 66; 58 Am. Dec. 102; *Martin v. Pope*, 6 Ala. 532; 41 Am. Dec. 66; *Brinagar v. Phillips*, 1 B. Mon. 283; 36 Am. Dec. 575; *Oberndorf v. Union Bank*, 3 Md. 126; 1 Am. Rep. 31. *Newell v. Hamer*, 4 How. (Miss.) 684; 35 Am. Dec. 415; nor by mere delay

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to prosecute: *Caston v. Dunlap*, Rich. Eq. Cas. 77; 23 Am. Dec. 194; *Hunt v. Bridgham*, 2 Pick. 581; 13 Am. Dec. 458; *Police Jury v. Hays*, 2 La. 41; 20 Am. Dec. 294; *Cooper v. Wilcox*, 2 Dev. & B. Eq. 90; 32 Am. Dec. 636; *Carter v. Jones*, 5 Ired. Eq. 196; 49 Am. Dec. 425; *Wright v. Yell*, 13 Ark. 503; 58 Am. Dec. 336; *Cook v. Southwick*, 9 Tex. 615; 60 Am. Dec. 181. The general rule underlying these cases is thus expressed in a recent case: A creditor does not lose his right to hold the surety by inaction or passiveness, except in cases where the surety has taken such steps as compel the creditor to proceed or lose his claim: *Barnes v. Mowry*, 129 Ind. 568. Thus the mere omission by the holder of a note to present it to the assignee (for the benefit of creditors) of the principal creditor will not discharge the surety: *Dye v. Dye*, 21 Ohio St. 86; 8 Am. Rep. 40; nor is a surety discharged by the creditor's failure to present a claim to the administrator of the deceased principal within the time prescribed by law: *Johnson v. Plasterers' Bank*, 4 Smedes & M. 165; 43 Am. Dec. 480; *Minter v. Branch Bank*, 23 Ala. 762; 58 Am. Dec. 315; *Ashby v. Johnston*, 23 Ark. 163; 79 Am. Dec. 102.

SURETYSHIP AND GUARANTY — DIFFERENCE BETWEEN. — The word "security" indicates an obligation to stand for the sum absolutely, unless discharged by the supine negligence of the obligee after notice, while the word "guaranty" imports a conditional liability, if due steps are taken against the principal: *Marberger v. Potts*, 16 Pa. St. 9; 55 Am. Dec. 479. The distinction is also explained in *Starges v. Bank of Circleville*, 11 Ohio St. 153; 78 Am. Dec. 296. *McMillan v. Bull's Head Bank*, 32 Ind. 11, 2 Am. Rep. 323, was a case in which the given contract was held to be one of suretyship, not of guaranty.

WILMOTH v. HENSEL.

[151 PENNSYLVANIA STATE, 200.]

REWARD — WHEN EARNED — VIOLATION OF ELECTION LAWS. — A reward offered for the conviction of persons for offenses thereafter committed against election laws is earned by the prosecution of and a plea of guilty by one accused of such crime, although sentence is suspended and punishment is never imposed.

CRIMINAL LAW — CONVICTION. — A plea of guilty by or verdict against one accused of crime is a conviction.

REWARD — CONSIDERATION. — PAYMENT of a reward offered for the conviction of a person for an offense thereafter committed against election laws cannot be resisted on the ground of want of consideration, when a person accused of such crime has been prosecuted to a plea of guilty in good faith.

REWARD — PUBLIC POLICY. — An offer of reward for the conviction of persons for offenses thereafter committed against election laws is not void as against public policy.

E. L. Keenan and M. F. Elliott, for the appellant.

John G. Johnson and J. M. McClure, for the appellee.

PAXSON, C. J. This case was fought step by step in the court below, and pressed with much zeal and ability here.

The specifications of error are too numerous to be considered in detail. Several of them are to the admission of evidence; the remainder to answers to points, and the charge of the court.

The facts may be summarized as follows: During the political campaign of 1882, the appellant (defendant below) was chairman of the Democratic state committee. It is alleged that as such chairman he caused to be published an advertisement offering a reward of one thousand dollars "for the prosecution and conviction of persons who violate any of the statutes of this commonwealth against bribery or corruption at elections"; that, later in the campaign, he visited Bradford, McKean County, and in a political speech there he declared that his committee proposed to put a stop to bribery and corruption at elections, and that he had one thousand dollars to pay for the arrest and conviction of persons who violate the election laws at the coming election. It further appeared that one B. J. Wilmoth, the plaintiff below, on the night before the election, obtained from E. N. Howard, a tax collector of Bradford township, a tax receipt purporting to have been issued to E. S. Johnson, a fictitious person; that Wilmoth paid him for it, and obtained from him at the same time a number of blank tax receipts; that he at once arrested Howard and had him bound over to appear at court. He was subsequently indicted for the offense, to which he pleaded guilty; whereupon the court of quarter sessions suspended sentences; the defendant was allowed to go without day, and no punishment has ever been imposed upon him. It was alleged, however, that he was required to pay the costs.

This suit was brought in the court below by Wilmoth against the defendant to recover the reward of one thousand dollars offered by the latter. The defendant refused to pay, on the grounds that the prosecution had not been *bona fide*; that the plaintiff had procured the offense to be committed; and that his offer of reward did not contemplate the payment of persons for procuring violations of the law.

The *bona fides* of the prosecution was fairly submitted to the jury. The learned judge below instructed them, in his charge, as follows: "I have no hesitation in saying that if Wilmoth induced this man to commit a crime, either by himself or those he employed, by any trick or device or artifice, induced him to do a thing that he would not have done of his own volition and own mind, there could be no recovery. But

if he simply went to him and asked him for a tax receipt, and that was all he did, and it was furnished him, I don't think that that was such a trick or artifice as makes it improper or illegal that Mr. Wilmoth should recover the reward alleged to have been offered."

In view of this charge, we must regard this branch of the case as disposed of by the verdict of the jury.

It was further contended by the appellant that there was no conviction within the meaning of the offer; that the conviction is only complete when followed by the judgment of the court. Upon this point we have been furnished with an elaborate argument on both sides. It is not needed that we should enter upon a discussion of the meaning of the word "conviction" in its technical sense. We must regard it as it was probably intended to be used, in its popular sense. In common parlance, a verdict is called a conviction: *Smith v. Commonwealth*, 14 Serg. & R. 69. In this case there was more than a verdict. There was a plea of guilty, which was a confession of guilt by the defendant. This was all that it was possible for the prosecutor to do. He had brought the offender to the bar of the court and compelled a plea of guilty. He had no further control of the case. The sentence was entirely within the power of the court. We are of the opinion that Howard was convicted of an offense against the election laws within the meaning of the defendant's offer.

A careful examination of the specifications which refer to the admission of evidence fails to disclose error. All that was objectionable in the deposition of John Murphy appears to have been excluded, and the other specifications upon this branch of the case are without merit.

Nor do we find error in the answers to points. The position assumed by the defendant, that if he did offer a reward "for the arrest and conviction of any person who should, between the dates of the offer and the ensuing election, commit any offense against the election laws of Pennsylvania, such offer was without consideration as between the plaintiff and defendant," cannot be sustained: See seventh specification. The reason given for this assumption is, that each had an equal interest in preserving the purity of elections in the state of which both were citizens, and that the duty of one was the same as the duty of the other in regard to bringing to justice persons who should thereafter be guilty of violating the election laws. And the further suggestion was made, that an offer of

reward for the conviction of persons for offenses thereafter committed was void as against public policy.

We would regret to be compelled to sustain either of these positions. We must assume that the offer of this reward, made publicly, and in an impressive manner, at a large meeting of the Democratic party, was made honestly, and for the purpose of preventing election frauds at the ensuing election. Considered in this light, it was a commendable act, and worthy of imitation by others. When acted upon by a citizen, and an offender brought to justice by reason of the offer, we cannot say there was no consideration for the offer. While it may have been prompted by a sincere desire to enforce the election laws, it is, perhaps, not straining a point to say that the defendant may have at the same time intended to benefit the political party of which he is so conspicuous a member. Having had this advantage or consideration for his offer, he is not in a position to repudiate it upon the ground of want of consideration. Upon the faith of it, the plaintiff may have expended both time and money in doing what he was under no legal duty to do. He was not charged by the law, either with detecting offenses or with bringing offenders to justice. On the contrary, those duties are cast by the law upon its legally constituted officers.

Even yet more untenable is the defendant's position, that it is against public policy to offer a reward for the conviction of persons for offenses thereafter to be committed against the election laws. We would be loath to believe that the defendant, in order to obtain a political advantage for his party, would have offered the reward if he knew it was against public policy. An offer of this kind is intended to deter people from the commission of such offenses. There is nothing in it which operates as a lure or inducement to persons to violate the law. Offenses against the election laws are the most deadly perils which the state has to endure. They strike at the foundations of social order. They are at all times difficult to reach, and, with few exceptions, go without detection and punishment. No surer method of reaching them has ever been devised than that of offering a reward. There are numerous instances in which it has been successful, of which the present case is one, and those who have procured this result are entitled to commendation for their liberality and public spirit.

We find no error in the answer of the court below to the de-

pendant's second point, nor do we find substantial error in any of the other answers to points, or in those portions of the charge embraced in the respective specifications. The case was fairly submitted to the jury, and the verdict appears warranted by the testimony.

Judgment affirmed.

REWARDS, WHEN EARNED: See extended note to *Hayden v. Souger*, 26 Am. Rep. 7, 8. The cases of *Cranshaw v. City of Roxbury*, 7 Gray, 374, and *Louisville etc. R. R. Co. v. Goodnight*, 10 Bush, 552, 19 Am. Rep. 80, there cited, are in accord with the ruling of the principal case.

ALTOONA SECOND NATIONAL BANK v. DUNN. GARDNER v. DUNN.

[151 PENNSYLVANIA STATE, 228.]

NEGOTIABLE INSTRUMENTS — ACCOMMODATION NOTES WITH RESTRICTIONS.

— When the payee of a sealed accommodation note receives it subject to the restriction that it is to be used only in obtaining a loan, he cannot pledge it for an antecedent debt; but if he receives it without restriction as to its use, he may so pledge it.

NEGOTIABLE INSTRUMENTS — ACCOMMODATION NOTES — DEFENSES AGAINST.

— Proof that an accommodation note was given subject to the restriction that it was only to be used in obtaining a loan is a perfect defense by the maker against it in the hands of a pledgee, to whom it has been given as security for an antecedent debt.

RULES to open judgments. Edward T. Dunn and Ellen Dunn, his mother, were indebted to the appellee bank, of which H. A. Gardner was cashier, in the sum of ten thousand dollars, and being called upon for security, said Edward obtained judgment notes aggregating ten thousand dollars from three of his brothers and sisters, and presented them to the bank. The bank accepted them as security, and entered up the judgments. The note in suit was given by Maggie Dunn to her brother, the said Edward, upon his representation that it would enable him to obtain a further loan from the bank, and it was given for this purpose. Edward Dunn seems to have received the other notes from his brothers and sisters upon the same representations; but after the bank had received all the notes from him, and entered up judgments thereon, it refused to make any further loans to him, and as his insolvency followed, the makers of the above notes were sought to be held responsible for his debt. The rules to open

the judgments entered up by the bank upon the above notes were discharged, and the makers thereof appealed. Other facts appear in the opinion.

John G. Johnson, Martin Bell, and John D. Blair, for the appellants.

A. S. Landis, Greevy and Patterson, and William S. Hammond, for the appellees.

HEYDRICK, J. Conceding that the learned court below was justified by the evidence in the finding that "there was no misrepresentation on the part of Gardner to obtain the notes," it does not follow that the appellant can be held beyond the amount, if any, which the bank advanced upon her credit. The plaintiff does not claim to have advanced more than about four hundred dollars upon the appellant's credit, and there is some doubt whether that sum was not advanced before the note in controversy was made, and without the knowledge or any promise upon the part of the appellant. While it is quite clear that two of the parties to the note, Edward T. Dunn and Ellen Dunn, were indebted to the bank in the sum of ten thousand dollars, for which it held the note of the latter, indorsed by the former, and that it was pressing for security for this indebtedness, it is not pretended that it accepted the note in suit in payment, or surrendered the note which it already held. The cashier says that when Edward handed it to him he told him that it was not what he had promised, and was not satisfactory, and insisted that he get the signatures of the other heirs of his father to it. And when Edward brought in three other judgment notes for \$3,333.33 $\frac{1}{2}$ each, signed by three of his brothers and sisters, the appellants in three other cases argued herewith, it does not appear that all together were accepted in payment of the original debt. On the contrary, Mr. Gardner says: "Some time after that (the delivery of the last three notes), Mr. Dunn came in with a receipt drawn up, I do not remember the amount of it exactly, but, substantially, it was an acknowledgment on our part that both these three notes and the one given by him a few days before for ten thousand dollars were to secure the note of his mother held by us, and not for twenty thousand dollars indebtedness, as the face of them would show. It appeared to me to be fair and right, and I signed and delivered it to Mr. Edward T. Dunn."

The bank, then, upon its own showing, held these notes as collateral security for an antecedent debt, and it did not even

give time upon the original debt, because the notes were payable one day after date, and the evidence shows that that time must have elapsed before they were accepted. It was not, therefore, a *bona fide* holder for value: *Lord v. Ocean Bank*, 20 Pa. St. 384; 59 Am. Dec. 728; *Lenheim v. Wilmarding*, 55 Pa. St. 73; *Pratt's Appeal*, 77 Pa. St. 378; *Royer v. Keystone National Bank*, 83 Pa. St. 248; *Carpenter v. National Bank of the Republic*, 106 Pa. St. 170.

The next question is as to the character of the note. If it were an accommodation note,—that is to say, commercial paper given without value to enable the party to whom it was given to use it for his own benefit, without restriction as to the manner in which it should be used,—there is no question that it could have been pledged as collateral security for an antecedent debt. “He who chooses to put himself in the front of a negotiable instrument for the benefit of his friend must abide the consequence, and has no more right to complain if his friend accommodates himself by pledging it for an old debt than if he had used it in any other way”: *Lord v. Ocean Bank*, 20 Pa. St. 384; 59 Am. Dec. 728. And since accommodation paper, strictly so called, in the hands of a pledgee for an antecedent debt is open to any defense, except want of consideration, that could be made to it in the hands of an original party (*Cummings v. Boyd*, 83 Pa. St. 372; *Carpenter v. National Bank of the Republic*, 106 Pa. St. 170), it might be difficult to show why a sealed bill given for accommodation, and without restriction as to the manner of its use, might not be pledged in like manner as a negotiable note. But it is not necessary to decide this point. The note was not signed by the appellant without restriction as to the manner of its use, if she can be believed, and if it had been negotiable, the present defense would have been available: *Royer v. Keystone National Bank*, 83 Pa. St. 248. She testified that she signed it to enable her brother to obtain a loan; and in this she was not contradicted, nor did the learned court below find that she was unworthy of belief. The expression of this one purpose was the exclusion of every other, and a restriction upon the manner in which the note should be used. Being under no obligation to either her brother or the bank, she could withhold her signature, or give it upon her own terms; and because she had the right to impose terms arbitrarily, there can be no inquiry as to whether the use that was made of the note was

more disadvantageous to her than that stipulated would have been.

For these reasons, the decree of the court below is reversed, and a *procedendo* is awarded.

Accommodation Paper — Rights and Liabilities of Makers and Indorsers.*

Nature of Contract. — An accommodation maker or indorser is a person who has signed a note without receiving value, and for the purpose of lending his name to some other person as a means of credit: Benjamin's Chalmers's Digest, art. 90; Randolph on Commercial Paper, sec. 472; *Miller v. Larned*, 103 Ill. 562. An accommodation note, in the strict sense, is a loan of the maker's credit without instructions as to the manner of its use: *Lenheim v. Wilmarling*, 55 Pa. St. 78. The party accommodated impliedly agrees to take up the note at maturity, and to indemnify the accommodation maker or indorser against the consequences of non-payment: *Reynolds v. Doyle*, 1 Man. & G. 753; *Asprey v. Levy*, 16 Mees. & W. 851. As to third parties, the rights and liabilities of an accommodation party are, in general, the same as those of a party receiving valuable consideration for his signature; but between the accommodation party and the person accommodated, there is no such liability, and one who draws or indorses commercial paper for the accommodation of another is not liable on it to him, whatever their apparent relation upon the paper may be: *Miller v. Larned*, 103 Ill. 562.

Liability of Maker or Indorser. — The contract and liability of an accommodation party are, in general, those of a surety for the party accommodated: *Noll v. Oberhellmann*, 20 Mo. App. 336; *Child v. Eureka Powder Works*, 44 N. H. 354; *Cummings v. Little*, 45 Me. 183; *Barron v. Cady*, 40 Mich. 259; *Blakeslee v. Hewett*, 76 Wis. 341. And if he takes up the paper at maturity, the party accommodated will be liable for it as a principal is to a surety: *Burton v. Slaughter*, 26 Gratt. 914; *Lacy v. Lofton*, 26 Ind. 324. In some jurisdictions, however, an accommodation maker is held liable as a principal, and not as a mere surety, as to a *bona fide* holder for value, and without notice: *Stephens v. Monongahela Nat. Bank*, 88 Pa. St. 157; 32 Am. Rep. 428; *First Nat. Bank v. Morgan*, 6 Hun, 346. The maker of an accommodation note delivered to the payee to be discounted for his benefit cannot set up want of consideration as a defense against the holder for value: *Waite v. Kalmisky*, 22 Ill. App. 382; *Miller v. Larned*, 103 Ill. 562; *Grant v. Ellicott*, 7 Wend. 227. The very purpose of making accommodation paper is that the party favored may dispose of it, and unless restricted, he may transfer it, either before or after maturity, and the maker or indorser will be equally bound. The only safe rule is, that when a note is given without restriction as to the time or mode of using it by the party accommodated, and it has been transferred in good faith and in the usual course of business, the holder, if he paid a valuable consideration for it, will be entitled to recover the full amount, although he may have had full knowledge that it was accommodation paper: *Winters v. Home Ins. Co.*, 30 Iowa, 172; *Jones v. Berryhill*, 25 Iowa, 289; *Thompson v. Shepherd*, 12 Met. 311; 46 Am. Dec. 676; *Thatcher v. West River Nat. Bank*, 19 Mich. 196; *Powell v. Waters*, 17 Johns. 176; *Miller v. Larned*, 103 Ill. 562; *First Nat. Bank v. Grant*, 71 Me. 374; 36 Am.

* REFERENCE TO MONOGRAPHIC NOTE.

Accommodation paper, defenses available to acceptor of: 1 Am. St. Rep. 126-128.

Rep. 384; *Seyfert v. Edison*, 45 N. J. L. 393. When a note is made to enable the maker to raise money upon it, and it is indorsed by him for that purpose, the indorsee may recover upon it, not only as against the payee and indorser, but against all others who may have signed it: *Norfolk Nat. Bank v. Griffiths*, 107 N. C. 173; 22 Am. St. Rep. 868. A person who makes his negotiable note, and gives it to another to raise money on, is bound by the note to a third person, who takes it for value; and in this respect there is no difference between a promissory note and a bill of exchange: *Hawkins v. Neal*, 60 Miss. 256. When such a note is made for the accommodation of the payee, and is left with him to be used in the general transaction of his business, it has no vitality while it remains in his possession; but when negotiated by him, it stands on an equality with other commercial paper, and the maker is bound primarily and unconditionally for its payment. When such note is not made for any special purpose, and there is no restriction on its use by the payee, the title and rights of the holder, as against the maker, are not affected by the fact that he acquired it of the payee after maturity with knowledge of the relation existing between the payee and the maker: *Connerly v. Planters' etc. Ins. Co.*, 66 Ala. 432.

An accommodation note, indorsed by the payee, and delivered to one of the makers before due, to be negotiated, is not presumed to have been paid, and the person purchasing it in good faith and for value may recover thereon: *Morris v. Morton*, 14 Neb. 358. When the assignee of accommodation paper again assigns it, before maturity, to an innocent purchaser for value, the latter takes it free of all equities between the first assignee and the payee: *Cook v. Norwood*, 106 Ill. 558. An accommodation indorser who signs a negotiable note, leaving the amount blank, and intrusts it to another with authority to fill the blank with an agreed sum, will, as to third persons having no knowledge of the limitations of such authority, be bound by the act of the person to whom the instrument is intrusted, although he fills the blank with a larger sum than that agreed upon: *Johnson Harvester Co. v. McLean*, 57 Wis. 258; 46 Am. Rep. 39. An accommodation indorser cannot set up, in a suit against him and his indorsee, that there was an agreement between them, at the time of putting their names on the paper, that such indorsement should constitute a joint, and not a successive, liability: *Johnson v. Ramsey*, 43 N. J. L. 279; 39 Am. Rep. 580. An accommodation indorser on a note may, by agreement between himself and a subsequent indorser, render himself liable to the latter as an actual indorser for value: *Leake v. Hancock*, 76 Cal. 127.

Although there is some conflict of authority, the general rule seems to be well settled that several accommodation indorsers on a note are not co-sureties, in the absence of an agreement between them to that effect: *Moody v. Findley*, 43 Ala. 167. Thus when several persons indorse their names on a note, in order to enable the maker to get it discounted, and some of them afterwards, on the failure of the maker, pay the note, they cannot maintain an action against the others for contribution, without proving that the relation between them was really that of co-sureties; but parol evidence is always admissible to show that such indorsers, by agreement between themselves, constituted themselves co-sureties: *Clapp v. Rice*, 13 Gray, 403; 74 Am. Dec. 639; *Winterly v. Barber*, 66 N. Y. 433. In the absence of such special agreement, an accommodation indorser who is obliged to pay it to a holder for value may maintain an action for the whole amount, as against a prior indorser: *Shaw v. Knox*, 98 Mass. 214; *McCarty v. Root*, 21 How.

432; *McDonald v. McGruder*, 3 Pet. 470; *McCune v. Bell*, 45 Mo. 174; *Core v. Wilson*, 40 Ind. 204; *Phillips v. Plato*, 42 Hun, 189.

A subsequent accommodation indorser who pays the note may recover of a prior indorser the whole amount paid, and not merely a contribution, as in case of sureties. It makes no difference that the indorsers both knew that each was an accommodation indorser, so long as there is no actual agreement between them to share the liability, nor, in the absence of such agreement, that the object of the indorsements is to enable the maker to get a loan at a bank upon the note, and that they were to operate together as a security to the bank: *Kirschner v. Conklin*, 40 Conn. 77. When one of two accommodation signers executes a note as a joint maker with the principal debtor, and the other as payee and indorser, and there is no special agreement between them, the former cannot, after paying the note, call upon the latter for contribution: *Hillegas v. Stephenson*, 75 Mo. 118; 42 Am. Rep. 393. When the payee of an accommodation note indorses it in blank, after which it is indorsed in blank by two other persons, it will not be presumed that they are joint indorsers to the holder; but the presumption is, that they are successive indorsers, and the second indorser may be sued alone, without noticing the other indorser: *Givens v. Merchants' Nat. Bank*, 85 Ill. 442. In some jurisdictions the rule prevails that indorsers on accommodation paper for the benefit of third persons, when there is no special agreement between them, and when neither is benefited, are to be considered as co-sureties, and only entitled to contribution: *Daniel v. McRae*, 2 Hawks, 590; 11 Am. Dec. 787; *Dawson v. Pettway*, 4 Dev. & B. 306. So it was decided in *Douglas v. Waddell*, 1 Ohio, 413, 13 Am. Dec. 630, that accommodation indorsers of promissory notes are co-sureties, and that the last indorser cannot recover more than a contributive share against a previous indorser. This case is criticised, but adhered to, in *Barnet v. Young*, 29 Ohio St. 11, where the court said, quoting from the former case: "Where there are two or more upon an accommodation note, all of whom indorsed before the note became operative by being transferred to some person not a party, for value received, and all of whom are charged by notice of demand and non-payment, they shall be treated as co-sureties, and contribution shall be made between them as such. Although the doctrine thus laid down and applied to promissory notes is not in accord with the great weight of authority on the subject, yet the length of time that has elapsed since the decision was made, its having been subsequently recognized by this court without questioning its correctness, and the fact that the rule as this class of commercial paper is and has been long understood in the state, all unite in requiring the decision to remain undisturbed." The rule maintained by these Ohio cases also prevails in Vermont: *Pitts v. Flanagan*, 23 Vt. 160; 56 Am. Dec. 61.

Pledge as Collateral Security or in Payment. — The rule is well settled that one not induced by fraud, who makes or indorses a note or bill for the accommodation of another, without restriction as to its use, is liable to a holder or indorsee who receives it in good faith, before due, as collateral security for an antecedent debt or in payment of a pre-existing or concurrent debt of such holder or indorsee, although there is no other consideration, as the existence of the debt is sufficient consideration for the transfer: *Schapp v. Carpenter*, 51 N. Y. 602; *Pitts v. Foglesing*, 37 Ohio St. 676; 41 Am. Rep. 540; *Washington Bank v. Krum*, 15 Iowa, 53; *Fetters v. Muncie Nat. Bank*, 34 Ind. 251; 7 Am. Rep. 225; *Grocers' Bank v. Penfield*, 69 N. Y. 502; 25 Am. Rep. 231; *Miller v. Larned*, 103 Ill. 562; *Quinn v. Hard*, 43 Vt. 373; 5 Am. Rep. 284; *Kimbro v. Lytle*, 10 Yerg. 417; 31 Am. Dec. 535; *Dunn*

v. *Weston*, 71 Me. 270; 36 Am. Rep. 310; *Dawson v. Goodyear*, 43 Conn. 548; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540; 17 Am. Rep. 620. Thus when an accommodation bill is paid by one of the indorsers, and there is no special agreement that they should be bound to pay in equal proportions as co-sureties, the indorser who takes up the bill may assign it as collateral security for a pre-existing debt; and the assignee may recover of the original payee, who is also an indorser: *McCarty v. Roots*, 21 How. 432. One who takes accommodation paper as collateral for a precedent debt, and surrenders other security for it, is entitled to recover upon it as a holder for value: *Depeau v. Waddington*, 6 Whart. 220; 36 Am. Dec. 216. When a note with an accommodation indorsement is pledged to one who afterwards becomes a purchaser of it, he is entitled to recover against the accommodation indorser, even though he knew of the accommodation at the time he took the note: *Ranson v. Turley*, 50 Ind. 273. When such paper has been pledged as collateral, only the amount which is actually due and secured by it can be recovered from the accommodation maker or indorser: *Atlas Bank v. Doyle*, 9 R. I. 76; 98 Am. Dec. 368; *Buchanan v. International Bank*, 78 Ill. 500. This is also true when it has been transferred as collateral for advances made at the time, or afterward: *Gordon v. Boppe*, 55 N. Y. 665. In Alabama and in Pennsylvania, a creditor who receives accommodation paper as collateral security for the payment of a pre-existing debt is not regarded as having acquired it for a valuable consideration in the due course of business, and is not entitled to protection against equities or defenses on the part of the maker or indorser, of which he has no notice. This, however, is contrary to the great weight of authority: *Boykin v. Bank of Mobile*, 72 Ala. 262; 47 Am. Rep. 408; *Marks v. First Nat. Bank*, 79 Ala. 550; 58 Am. Rep. 620; *Royer v. Keystone Nat. Bank*, 83 Pa. St. 248; *Carpenter v. National Bank*, 106 Pa. St. 170. Even here, however, it is maintained that if a creditor takes the note in payment of a precedent debt, he becomes a purchaser for value in due course of business, equally as if he had advanced money on the faith of the note: *Marks v. First Nat. Bank*, 79 Ala. 550; 58 Am. Rep. 620.

Misappropriation. — When accommodation paper is made or indorsed for a restricted or special purpose, and has been fraudulently diverted from the purpose for which it was intended by the payee or indorsee in the payment of a debt, or as collateral security for a precedent debt or otherwise, a holder with knowledge of the purpose for which the paper was made is not a purchaser for value, even if he acquires the paper before maturity, so as to free it of all defenses and equities which exist in favor of the maker or indorser. When such paper has effected the substantial purpose for which it was designed by the parties, the accommodation maker or indorser cannot object that it was not effected in the precise manner contemplated at the time of its creation; but when the paper is diverted from its original destination, and fraudulently put in circulation by the payee or his agent, the holder cannot recover upon it against the accommodation maker or indorser, unless he received it in good faith in the ordinary course of trade, without notice and for value: *Wardell v. Howell*, 9 Wend. 170; *Small v. Smith*, 1 Denio, 583; *Moore v. Ryder*, 65 N. Y. 438; *Grocers' Bank v. Penfield*, 69 N. Y. 502; 25 Am. Rep. 231; *Thompson v. Poston*, 1 Duvall, 389; *Daggett v. Whiting*, 35 Conn. 386; *Duncan v. Gilbert*, 29 N. J. L. 521.

Fraudulent Diversion of Accommodation Paper from the purpose for which it was drawn, by pledging it as collateral security for a precedent debt or otherwise, is no defense to an action by a *bona fide* holder for value and with-

out notice, before maturity: *First Nat. Bank v. Hall*, 44 N. Y. 395; 4 Am. Rep. 698; *Fellers v. Muncie Nat. Bank*, 34 Ind. 251; 7 Am. Rep. 225; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540; 17 Am. Rep. 620. Thus when accommodation paper is fraudulently diverted from the purpose for which it was made, and a banker, who, without notice of such diversion, takes it from his payee as collateral for a previous loan not yet due, and in lien and upon surrender of collateral notes of other parties then past due, and protested for non-payment, which had previously been deposited as collateral to such loan, he is a *bona fide* purchaser, and entitled to recover against the accommodation maker, notwithstanding the diversion, and although the parties liable on the protested notes, for which this accommodation paper was substituted, were insolvent and the notes worthless: *Park Bank v. Watson*, 42 N. Y. 490; 1 Am. Rep. 573. An accommodation indorser of a note, which is diverted from the purpose for which it was made and indorsed, and is transferred by the maker as security for a precedent debt, cannot avail himself of the defense of the misappropriation of the note as against one who has received it from the original transferee in the usual course of business, for value, before maturity, without notice of such defense. The latter is within the protection accorded by the law merchant to all *bona fide* holders for value; and when, in such case, the original transferee of the note receives it without any knowledge of a restriction upon the rights of the makers in its use, and transfers it to a bank of which he is a director, the fact that he took it for a precedent debt does not affect the title of the bank: *Merchants' Bank v. Comstock*, 55 N. Y. 24; 14 Am. Rep. 168.

One who takes a note in good faith, for value, before its maturity, without knowledge of the death of the maker, or that it is accommodation paper, may recover on it against the estate of the maker, even though the indorser, for whose accommodation it was made, put it in circulation fraudulently as against the maker: *Clark v. Thayer*, 105 Mass. 216; 7 Am. Rep. 511. When a bill of exchange is drawn and indorsed for the accommodation of the acceptor, upon condition that it shall be discounted at a particular bank, a purchaser of the bill before maturity, without notice of the secret agreement, is not affected by it, though he may have taken the bill in payment of a pre-existing debt: *Frank v. Quast*, 86 Ky. 649. When a note is made or indorsed as accommodation paper with the understanding that it is to be discounted at a certain bank, or that money is to be obtained upon it in a particular manner, it is not a fraudulent misappropriation to discount it at a different bank, or to obtain money or credit upon it in a different way from what was intended. If the note effects the substantial purpose for which it was designed, it is not material that it was not effected in the precise manner contemplated, unless there is fraud, or the interest of the maker or indorser is prejudiced. In such case it is not a misappropriation to deposit the note as collateral security for letters of credit thus obtained, unless such act is a fraud upon the maker or indorser, or in some way injuriously affects his interest: *Duncan v. Gilbert*, 29 N. J. L. 521. If an accommodation note is given with an agreement that the payee is to deposit it temporarily as collateral security for a loan to be made to him, but instead of obtaining a new loan, with the note as collateral, he deposits it with a bank as security for money already owing by him to it, this is not a misappropriation, because the paper effects the substantial purpose for which it was designed, though the result is not produced in the precise mode contemplated; and in order to constitute a misappropriation, the misuse must be tainted with fraud: *Jackson v. First Nat. Bank*, 42 N. J. L. 177. When a note is drawn, payable at a certain

bank, and is indorsed for the accommodation of the maker, to enable him to raise money with which to purchase barley, and he then applies the note to the payment of a debt which he and another owe at a different bank, this is not such a diversion of the paper as will discharge the indorser, it not appearing that at the time of indorsing that the use to which it might be applied was at all important to him: *Mohawk Bank v. Corey*, 1 Hill, 513. When a note is indorsed by the payee to enable the maker to discount it at a bank for his accommodation, and the maker, upon being refused by the bank, discounts it to a third person, with knowledge of the circumstances, this does not amount to a fraud which can affect the rights of the holder against the indorser: *Powell v. Waters*, 17 Johns. 176; *Bank of Chenango v. Hyde*, 4 Cow. 567.

If an accommodation note is made payable to the accommodation indorser, to be discounted at a particular bank, but instead is sold to a private person, the indorsers thereon are liable, although the sale is made without their knowledge: *Parker v. McDowell*, 95 N. C. 219; 59 Am. Rep. 235. When a note is indorsed for the accommodation of the maker, to be discounted at a certain bank, it is not a fraudulent misapplication of the note to discount it at another bank, or to use it in the payment of a debt, or in any other way for the credit of the maker: *Parker v. McDowell*, 95 N. C. 219; 59 Am. Rep. 235. When an accommodation indorser agrees with the maker of a note that it is to be used only at a certain bank, and such bank, with notice of the agreement, advances money upon the note, and retains it as collateral security, it may then dispose of its claim against the maker, and transfer the note as collateral security therefor, and such transfer will not constitute a misappropriation as against the accommodation indorser: *Proctor v. Whitcomb*, 137 Mass. 303. When the maker of a note, indorsed for his accommodation for a special purpose, misapplied it, and transferred it before maturity as collateral security for a debt, part of which he afterwards paid, it was decided that the holder, taking it without notice of its misapplication, might recover of the indorser the unpaid balance of the debt for which it was pledged as security, but no more: *Stodlard v. Kimball*, 6 Cush. 469; *Duncan v. Gilbert*, 29 N. J. L. 521. The fact that accommodation paper is made payable to a particular person or at a particular place does not, without more, prevent the person to whom it is intrusted, and for whose accommodation it is made, from obtaining the money from another. Unless the makers or indorsers have some interest beyond the mere accommodation of their principal, any person may assume that it is an accommodation to advance the amount of money the paper calls for. Thus when mere accommodation makers, having no interest beyond the accommodation of their principal, either in the mode of raising the money, or in the manner in which it is to be applied, sign a note made payable to a named person, the fact that without their consent the note is delivered to another without any alteration, who advances the money upon it, is not such a perversion of the paper as will defeat it in the hands of a holder for value: *Meeker v. Shanks*, 112 Ind. 207. It is not a good defense to an action by the payee against the makers of a note that such makers are sureties for the principal maker, and that after signing it they intrusted it to him upon the condition that he procure the signature of a designated person as an additional surety, and that he delivered the note to the payee without their knowledge or consent, and without complying with the condition. In such case it must also be averred and proved that the payee, before the delivery to him, had notice of the condition: *Jordan v. Jordan*, 10 Lea, 124; 43 Am. Rep. 294.

In order that misappropriation of the paper may be set up as a defense by the accommodation maker or indorser, it is generally necessary that the party acquiring it have notice of the restricted indorsement, and that the condition has not been complied with, and also that the perversion of the paper from the purpose intended by the parties has injuriously interfered with the interest of the maker or indorser. When this condition exists, the holder is not considered a purchaser for value, and cannot recover of the maker or indorser against whom the paper has thus been fraudulently diverted. Thus when a bill of exchange, indorsed for accommodation, and delivered to the maker on the express condition that if it is not that day discounted by a particular bank, it is to be returned to the indorser or destroyed, and after the bank has refused to discount the bill, it is passed to another, with notice, to pay an existing debt, this is such a perversion and misappropriation of the paper as releases the indorser: *Hickerson v. Raignet*, 2 Heisk. 329. When a note is signed by a number of persons, it having a condition attached to it, in writing, that before its delivery ten solvent persons should sign it, and it is delivered after the condition has been complied with, and detached from the note, the party taking it with knowledge of the condition also takes the risk of the solvency of such signers, and cannot hold the indorser, unless the condition has been complied with: *Campbell Printing Press etc. Co. v. Powell*, 78 Tex. 53. When a note is indorsed in blank, and left with a third person to be signed by the maker and used for a particular purpose, and the maker takes it from the depository without his knowledge, fills it up, and gives it to third parties with notice of the condition, this is such a fraud on the indorser as will release him: *Lenheim v. Wilmarding*, 55 Pa. St. 73. When an accommodation note is designed to be discounted for the purpose of taking up other paper of the person giving the accommodation, or is otherwise intended for his benefit, a failure to have it thus used is a misappropriation. Thus when a note is indorsed for the accommodation of the maker, and delivered to him to be used in renewal of another note indorsed by the same party, and about to fall due, and it is transferred by the maker in payment of another debt existing against him, it cannot be enforced against such indorser by the creditor taking it with notice of the condition: *Wardell v. Howell*, 9 Wend. 170; *Kasson v. Smith*, 8 Wend. 436. If the holder of such paper misappropriates it with notice, he will be bound to reimburse the party whose name is misused for any resulting loss: *Comstock v. Hier*, 73 N. Y. 269; 29 Am. Rep. 142. When a pledgee of a note is made a garnishee, he cannot defend on the ground that the note is accommodation paper, pledged for a specific purpose, and not to be enforced against the maker for any other purpose, as such defense can be resorted to by the drawer only when sued upon the note: *Kirkpatrick v. Oldham*, 38 La. Ann. 553. When the payment of accommodation paper is resisted on the ground that it has been misappropriated, and diverted from the purpose for which it was intended, the burden of proof is generally upon the maker or indorser to show such misappropriation, because the holder is presumed to be a bona fide purchaser for value: *Maitland v. Citizens' Nat. Bank*, 40 Md. 540; 17 Am. Rep. 620; *Jordan v. Jordan*, 10 Lea, 124; 43 Am. Rep. 294; *Hall v. Thayer*, 105 Mass. 219; 7 Am. Rep. 513; *Gray v. Bank of Kentucky*, 29 Pa. St. 365. After such diversion is shown, however, the burden of proof is then upon the holder to establish that he is, or has succeeded to rights of, a bona fide holder for value and without notice: *Farmers' Nat. Bank v. Nixon*, 45 N. Y. 762; *Schepp v. Carpenter*, 51 N. Y. 602-604.

Rights of Accommodation Makers and Indorsers. — As has been elsewhere stated in this note, accommodation indorsers of negotiable instruments are not co-sureties as between themselves, nor liable to contribution, in the absence of an understanding between them to that effect before or at the time of the indorsements. A subsequent understanding, in the absence of a new consideration, will not support an action for contribution by a prior against a subsequent indorser: *Druhe v. Christy*, 10 Mo. App. 567; *McGurk v. Huggett*, 56 Mich. 187. When the last indorser has to pay the note, he can recover the whole amount from his predecessors, and from the maker: *McGurk v. Huggett*, 56 Mich. 187. When two indorsers on a note become such for the accommodation of the maker, the first indorser is liable to the second, and when the latter pays and takes up the note, he becomes a holder for value, and entitled to indemnity from the former: *Kelly v. Burroughs*, 102 N. Y. 93. An accommodation indorser is not a surety in such sense as to enable him to discharge himself from liability on a note by proving a request to the holder to enforce payment of the maker, the neglect of the holder to do so, the solvency of the maker when such request was made, and his subsequent insolvency: *Converse v. Cook*, 25 Hun, 44. One who indorses a note before delivery, with the intention of assuming the liability of an indorser, in order to give the principal in the note credit with a bank, is liable as an indorser, and not as a surety, and the failure of the bank to give notice of the dishonor of the note results in the discharge of such indorser. In such case it is not material that the bank and the maker of the note intended that the indorser should be bound as surety, unless there was an agreement to that effect with the indorser: *De Pauw v. Bank of Salem*, 126 Ind. 553. When the holder of accommodation paper has recovered judgment thereon against the maker, and holds sufficient of the property of the latter under levy to satisfy the note, but releases the levy without applying such property to the satisfaction of his judgment, an accommodation indorser on such paper is thereby released from liability: *Priest v. Watson*, 75 Mo. 310; 42 Am. Rep. 409; *Capital Savings Bank v. Reel*, 62 Cal. 419. Indulgence by the holder of accommodation paper to the payee thereof, without the consent of the indorser, granted for a consideration, will discharge the latter: *Hall v. Capital Bank*, 71 Ga. 715. One who is liable on a note cannot, after paying it, recover the sum so paid from one who has indorsed the note for his accommodation: *Grabbe v. Boese*, 10 Mo. App. 492. When the payee of accommodation paper, or a person discounting it with knowledge of the purpose for which it was made, has been guilty of usury, this defense is open to the accommodation maker or indorser: *Tufts v. Shepherd*, 49 Me. 312; *Keim v. Bank of Penn Township*, 1 Pa. St. 36.

Accommodation bills and notes are subject to the general rule that one taking overdue negotiable paper takes it subject to all equities: *Bacon v. Harris*, 15 R. I. 599. An accommodation indorser of a note, who takes it up at maturity without notice of any infirmity, and in discharge of his own debt to the holder, or in consideration of his own note given therefor, may recover the amount of the note taken up from the maker thereof: *Breckinridge v. Lewis*, 84 Me. 349; 30 Am. St. Rep. 353. An accommodation indorser may withdraw his indorsement at any time before the note is discounted, unless rights for a valuable consideration have in the mean time attached in others: *Second Nat. Bank v. Howe*, 40 Minn. 390; 12 Am. St. Rep. 744; and after it has been negotiated, such indorser's liability is limited to the amount advanced in good faith by the holder: *Berkeley v. Tinsley*, 88 Va. 1001. An accommodation indorser of a note, transferred to a bank as collateral security for rent due

and to become due, cannot be held liable for rent subsequently accruing under a new lease, when the bank has notice of the nature of the transaction and of the intention of the parties: *Continental Nat. Bank v. Bell*, 125 N. Y. 33. An accommodation indorser who receives no benefit therefrom may defend against a *bona fide* holder of the indorsed note on the ground that he was *non compos mentis* at the time of the indorsement, although the holder had no notice of the indorser's lunacy at the time of the transfer: *Wirebach v. First Nat. Bank*, 97 Pa. St. 543; 39 Am. Rep. 821. One who has discounted negotiable paper for the maker cannot be compelled by the accommodation indorser to resort to collaterals belonging to the maker in his hands before resorting to him, although the indorser relied upon the collaterals in making such indorsement, although the holder knew of his reliance, and that the indorsement was for accommodation, and the proceeds were applied by the holder to payment of other paper of the maker, and other parties are in the same situation with the indorser. The remedy of the indorser is to pay the paper and demand and enforce the security: *First Nat. Bank v. Wood*, 71 N. Y. 405; 27 Am. Rep. 66. An accommodation indorser of a note is entitled to be subrogated to all the rights and remedies of the maker, if the note was given in payment of a machine warranted to accomplish certain purposes, which warranty has wholly failed, if the holder of the note acquired it after maturity, with notice of the warranty and of its breach, and the maker is insolvent: *McDonald Mfg. Co. v. Moran*, 52 Wis. 203.

By Corporations.—The indorsement of negotiable paper for accommodation is not a necessary incident to the business of a corporation, and unless such transaction is authorized by its charter, such indorsement is unlawful and *ultra vires*, and the corporation is not liable thereon: *National Bank v. Wells*, 79 N. Y. 498; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 308; *Morford v. Farmers' Bank*, 26 Barb. 568; *Bridgeport City Bank v. Empire Stone Dressing Co.*, 30 Barb. 421; *Savage Mfg. Co. v. Worthington*, 1 Gill, 284. Unless express power is granted, a corporation cannot execute accommodation paper; and such paper, if executed, is void in the hands of the assignee: *Smead v. Indianapolis etc. R. R. Co.*, 11 Ind. 105; or payee; and the corporation cannot ratify such note after execution by its officers, so as to create any liability in the hands of the payee against the corporation: *Hall v. Auburn Turnpike Co.*, 27 Cal. 256; 87 Am. Dec. 75. A banking corporation, whether state or national, has no authority to make an accommodation indorsement, in the absence of express power granted in its charter to that effect: *Bank of Genesee v. Patchin Bank*, 13 N. Y. 308; *National Bank v. Wells*, 79 N. Y. 499. The general powers of a manufacturing corporation give it no authority to indorse accommodation paper: *Lafayette Savings Bank v. St. Louis Stoneware Co.*, 2 Mo. App. 290. An accommodation indorsement made by a corporation is not binding upon it, unless the note has been discounted in good faith by the party holding it, in consequence of representations made by the corporation that it was its own note: *Morford v. Farmers' Bank*, 26 Barb. 568; *Bridgeport City Bank v. Empire Stone Dressing Co.*, 30 Barb. 421. When a corporation is authorized to make notes in its business, but exceeds its power in making an accommodation note, such note will be good in the hands of a *bona fide* holder, on the principle that otherwise the general power of making and transferring notes thus abused would leave a *bona fide* holder without means of information as to such abuse. Thus the accommodation note of such corporation, in the hands of a holder in good faith, for value, who takes it before maturity, and without knowledge that the maker has not received full consideration, can be enforced against the

corporation: *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; 3 Am. Rep. 322; *Bird v. Daggett*, 97 Mass. 494. When the corporation has exceeded its power by making an accommodation note, this defense is admissible under the general issue, and need not be specially pleaded: *Hall v. Auburn Turnpikes Co.*, 27 Cal. 255; 87 Am. Dec. 75. But the burden of proof to show that such paper was taken with notice that the corporation had no authority to make or indorse it lies on the defendant in a suit on the note: *Lafayette Savings Bank v. St. Louis Stoneware Co.*, 2 Mo. App. 299.

By Agent. — A general power given an agent to make or indorse notes or bills on behalf of his principal will not warrant the agent in putting the name of his principal to paper for the accommodation of the agent or a third person, and the principal will not be bound, in the absence of express authority in the agent to make or indorse accommodation paper in the name of his principal: *German Nat. Bank v. Studley*, 1 Mo. App. 260; *Etna Nat. Bank v. Winchester*, 43 Conn. 391; *Stainer v. Tyse*, 3 Hill, 279; *Bank of Hamburg v. Johnson*, 3 Rich. 42; *Wallace v. Branch Bank of Mobile*, 1 Ala. 565; *Gulick v. Grover*, 33 N. J. L. 463; 97 Am. Dec. 728. In the case last cited, Depue, J., in delivering the opinion of the court, said: "I take the rule to be well settled, that the authority to sign accommodation paper, or as security for a third person, must be specially given, unless the authority of the agent is one of universal agency, and will not flow from any general authority to transact business for the principal. The making of accommodation paper, or the loan of one's name as security for another, does not fall within the ordinary business in which persons engage. The authority to use a principal's name for that purpose is not established by proof of an agency, however general, in the transaction of the principal's business, even though in connection with such business it be shown that the agent was authorized to make notes in the name of his principal. To validate such paper, it must be shown that the agent was authorized to make use of his principal's name for that purpose, and his authority must either be express, or implied from proof that he was accustomed, with the principal's consent, to use his name for the accommodation of others. An agent who is authorized to draw and indorse notes, and to draw, indorse, and accept bills of exchange, can act under such authority only to the extent of his principal's business, and is not authorized to draw, indorse, or accept them for the accommodation of mere strangers"; *Gulick v. Grover*, 33 N. J. L. 467; 97 Am. Dec. 728. Yet when a note or bill is made or indorsed by an agent in the name of the principal for the accommodation of such agent or a third person, with the consent of the principal, or with his subsequent ratification, the principal is liable: *German Nat. Bank v. Studley*, 1 Mo. App. 260; *Gulick v. Grover*, 33 N. J. L. 467; 97 Am. Dec. 728. Thus when a note is made or indorsed by an agent with the consent of his principal for the purpose of taking up paper upon which the latter is already liable as an accommodation indorser or maker, the principal is bound: *German Nat. Bank v. Studley*, 1 Mo. App. 260.

By Partners. — The power of partners to bind one another by commercial paper does not extend to indorsements or other contracts for the accommodation of a third person. Hence the rule is well settled that when one member of a partnership becomes an accommodation maker or indorser, for the benefit of a third person, in the name of the firm, without the assent, express or implied, or the subsequent ratification of his copartners, such paper cannot be enforced against them or the firm by a holder who takes it with knowledge of its accommodation character: *Austin v. Vandermark*, 4

Hill, 259; *Lacerty v. Burr*, 1 Wend. 529; *Bank of Rochester v. Bowen*, 7 Wend. 159; *Boyd v. Plumb*, 7 Wend. 309; *Tyree v. Lyon*, 67 Ala. 1; *Foot v. Sabin*, 19 Johns. 154; 10 Am. Dec. 208; *Bank of Fort Madison v. Alden*, 129 U. S. 372; *National Bank v. Law*, 127 Mass. 72; *National Security Bank v. McDonald*, 127 Mass. 82; *Tompkins v. Woodyard*, 5 W. Va. 216; *Heffron v. Hanaford*, 40 Mich. 305; *Wilson v. Williams*, 14 Wend. 146; 28 Am. Dec. 518; *Stall v. Catskill Bank*, 18 Wend. 466; *Lang v. Waring*, 17 Ala. 145; *Chasournes v. Edwards*, 3 Pick. 5; *Vredenburg v. Lagan*, 28 La. Ann. 941; *Bank of Tennessee v. Saffarans*, 3 Humph. 597; *Long v. Carter*, 3 Ired. 238; *Whaley v. Moody*, 2 Humph. 495; *Chenoweth v. Chamberlain*, 6 B. Mon. 60; 43 Am. Dec. 145; *Rollins v. Stevens*, 31 Me. 454; *Andrews v. Planters' Bank*, 7 Smedes & M. 192; 45 Am. Dec. 300. One partner cannot, by his individual act, bind the firm as a guarantor of the debt of another, or as a party to a note or bill made for the accommodation or as the surety of another, without authority specially given him for the purpose, or implied from the common course of the business of the firm, or from the previous course of dealing between the parties, unless the act of such partner is afterwards ratified by his copartners: *Sweetser v. French*, 2 Cush. 309; 48 Am. Dec. 666. So an accommodation acceptance by one member of a firm, in the partnership name, without the authority or consent of his copartner, is not binding on the latter, in the hands of a holder who takes it with notice that it is purely an accommodation acceptance, and not given in the course of the business of the firm, but for the private use of a stranger, the drawer of the bill: *Bloom v. Helm*, 53 Minn. 21. The holder of accommodation paper made or indorsed by one partner in the firm name is generally chargeable with notice of its accommodation character, and such paper carries with it the presumption that the partner making or indorsing it is not authorized to do so: *Tanner v. Hall*, 1 Pa. St. 417. Hence in an action against a firm as the guarantor of the debt of another, or as a party to a bill or note made or indorsed for the accommodation or as the surety of another, when the contract is the act of an individual, the burden of proof is on the holder to show that such partner was authorized so to bind the firm by the others, that such act is done with their consent, or that it was subsequently ratified by them: *Sweetser v. French*, 2 Cush. 309; 48 Am. Dec. 666; *Tompkins v. Woodyard*, 5 W. Va. 216; *National Security Bank v. McDonald*, 127 Mass. 82; *Chasournes v. Edwards*, 3 Pick. 5; *Foot v. Sabin*, 19 Johns. 155; 10 Am. Dec. 208; *Bank of Vergennes v. Cameron*, 7 Barb. 144.

The rule is thus clearly laid down in *Hendrie v. Berkowitz*, 37 Cal. 113, 99 Am. Dec. 251: When one of two partners indorses a note in the name of the firm for the accommodation of a third person, without the authority or consent of the other partner, the latter is not bound by the indorsement as to any person taking the note with notice that the indorsement was made in the character of surety; and in such case the burden of proving the authority or consent of the copartner rests on the party holding the note; and if he takes it from the hands of the maker, this is notice that the firm indorsement was for the accommodation of the maker. A third party taking from a partner the signature of his firm upon his individual transaction cannot hold the firm, without proof of authority, adoption, or ratification. The holder of the note under such circumstances must prove the assent of the other partners, for, *prima facie*, such transaction is a fraud, both on the part of the debtor and of the creditor: *Tompkins v. Woodyard*, 5 W. Va. 216. If the holder knows, at the time that he takes the paper, that one of the partners has indorsed the partnership name on it as security for the maker, it is incumbent

upon him to rebut the presumption that he received the firm name as surety for another, in fraud of the partnership: *Darling v. March*, 22 Me. 184. When it is sought to charge the firm with the payment of a note or bill made or indorsed in the name of the firm by a copartner alone for the accommodation of himself or another, on the ground of implied authority or subsequent assent or ratification by the firm, the evidence must be strong, clear, and satisfactory, and slight and inconclusive circumstances will not be sufficient: *Wilson v. Williams*, 14 Wend. 146; 28 Am. Dec. 518. Such precedent authority may be implied from strong circumstances, from the common course of the business of the firm, or from the previous course of dealings between the parties, without direct proof: *Sweetser v. French*, 2 Cush. 309; 48 Am. Dec. 666; *Butler v. Stocking*, 8 N. Y. 408; *Pooley v. Whitmore*, 10 Heisk. 629; 27 Am. Rep. 733; *Andrews v. Planters' Bank*, 7 Smedes & M. 192; 45 Am. Dec. 300; *Darling v. March*, 22 Me. 184; *Wait v. Thayer*, 118 Mass. 473; *First Nat. Bank v. Breese*, 39 Iowa, 640. In *Early v. Reed*, 6 Hill, 12, it was decided that evidence that two partners had repeatedly, with the knowledge and consent of each other, indorsed accommodation paper, was not sufficient to show authority in one of them to sign the firm name as maker or surety, so as to bind the firm.

A subsequent ratification of such act on the part of an individual in signing accommodation paper in the name of the firm may be inferred from the acts or omissions of the other partners, after they know, or have means of knowing, of such act on the part of the individual partner: *Sweetser v. French*, 2 Cush. 309; 48 Am. Dec. 666; or it may be proved by other circumstantial evidence: *First Nat. Bank v. Breese*, 39 Iowa, 640. Of course, accommodation paper made or indorsed by one member of the firm in the firm name is binding on the firm, when it is shown that the firm authorized, consented to, or recognized the act of the individual member in contracting the liability and in making the note: *Bloom v. Stern*, 23 La. Ann. 747; *Star Wagon Co. v. Sweeney*, 52 Iowa, 391; 59 Iowa, 609. And it is also bound on a note given by him in renewal of such note: *Dundass v. Gallagher*, 4 Pa. St. 205.

When accommodation paper is made or indorsed by an individual partner in the name of the firm, without the knowledge or consent of his copartners, such paper is binding against the firm, when in the hands of a holder or indorsee, who, in good faith, for an adequate consideration, purchases the same, before maturity, in the usual course of business, and without knowledge of any of the circumstances affecting its validity. Hence all the members of a partnership are bound by a note made by one member in the firm name, and transferred for his sole benefit in the partnership name, when it falls into the hands of a *bona fide* purchaser or indorsee for value, without notice and before maturity: *Bank of St. Albans v. Gilliland*, 23 Wend. 311; 35 Am. Dec. 566; *Wells v. Evans*, 20 Wend. 251; *Redlon v. Churchill*, 73 Me. 146; 40 Am. Rep. 345; *Beach v. State Bank*, 2 Ind. 488; *Bank of Vergennes v. Cameron*, 7 Barb. 143; *Austin v. Vandermark*, 4 Hill, 259; *Chemung Canal Bank v. Bradner*, 44 N. Y. 680; *Whaley v. Moody*, 2 Humph. 495. When the name of a firm is affixed to negotiable paper by one of the partners for his individual accommodation, and the note is discounted at a bank in the usual manner, without knowledge of such fact, the firm is bound, although the note is made out of the course of the partnership business, and without the knowledge or consent of the other partners: *Waldo Bank v. Lambert*, 16 Me. 416; *Catehill Bank v. Stall*, 15 Wend. 364. In such case the form of the paper is not notice to the bank that it was given for the accommodation of the maker and

in fraud of the firm: *Redlon v. Churchill*, 73 Me. 146; 40 Am. Rep. 345; *Wait v. Thayer*, 118 Mass. 474.

Whether or not a firm can be held liable to a *bona fide* holder without notice, upon a note indorsed in its name by an individual member for his own accommodation, depends upon the nature of the business, the usual course of dealing of that firm, and the circumstances surrounding each particular case: *Pooley v. Whitmore*, 10 Heisk. 629; 27 Am. Rep. 733; *Roth v. Colwin*, 32 Vt. 125. And after proof of the manner in which the paper was created and put in circulation, the burden of proof is upon the holder to show that he received it *bona fide* and for a valuable consideration: *Bank of St. Albans v. Gilliland*, 23 Wend. 311; 35 Am. Dec. 566; *Bank of Vergennes v. Cameron*, 7 Barb. 143.

A member of a partnership, who, without authority from the firm, signs the firm name to a note as maker or indorser, for his own accommodation or that of a third person, is liable upon the note in the same manner and to the same extent as if he had signed his individual name thereto: *Silvers v. Foster*, 9 Kan. 56; *First Nat. Bank v. Carpenter*, 34 Iowa, 433.

DECKER v. SCRANTON CITY.

[161 PENNSYLVANIA STATE, 241.]

MUNICIPAL CORPORATIONS — ACCUMULATION OF ICE ON STREET — NEGLIGENCE. — A defective construction of a street, in conjunction with an accumulation of ice thereon, casts upon the municipality the duty of removing the obstruction on notice, and a failure to perform such duty is negligence.

MUNICIPAL CORPORATIONS — LIABILITY FOR ALLOWING ICE TO ACCUMULATE ON DEFECTIVE STREET. — When ice has accumulated on a street by reason of neglect on the part of the city to construct and maintain suitable drains to carry surface water away, the city is liable to a person injured by slipping and falling upon such ice.

TRESPASS for personal injuries. Plaintiff was injured by the overturning of his sleigh on Oak Street, in the city of Scranton. At the place where the accident occurred, the street was lowest in the middle, without drains at the side, and the surface water had gathered in the middle of the street, and, freezing, had caused an accumulation of ice. The street had been in this condition from two to four weeks prior to the accident. Judgment for plaintiff, and defendant appealed.

I. H. Burns, for the appellant.

S. B. Price and J. W. Carpenter, for the appellee.

McCOLLUM, J. It is alleged that error was committed by the learned court below in the refusal of the city's fifth, seventh, and eighth points. The first and second assign-

ments complain of the answers to the fifth and seventh points, and as they practically involve the same question, they may be considered together. The ground of complaint in these is, that the court declined to charge the jury that the city was not liable unless the ice had so accumulated in hills and ridges as to form an obvious physical obstruction to travel, and that the city had notice of the same. The points in question were predicated upon the principle that a municipality is not liable for injuries resulting from the general slipperiness of its streets, caused by the ice formed from the rain and snow falling upon them, but they entirely ignored the defective condition of the roadway, and the evidence showing that the ice upon it was formed from the water which the city negligently permitted to flow there from the broken hydrant. In his general charge the learned judge distinctly instructed the jury that the city was not liable in this case, unless they found that the road was defectively constructed by it, and that it negligently allowed the ice to accumulate there. He also instructed them that there was not such an accumulation of ice from natural causes—"from the results of an ordinary storm, or from the thawing and freezing that goes on in winter"—as the city was bound to remove. In these instructions the city obtained all that it was legally entitled to. It was certainly its duty to construct and maintain suitable ditches and sluices to carry off the water which ordinarily flowed from springs and other sources outside and in the vicinity of the highway. It could not, in violation of this duty, allow such water to run along the center of or over the road, until there was an accumulation of ice from it which rendered unsafe and obstructed travel thereon, without incurring liability to a party who, in consequence thereof, sustained an injury. A defective construction of the road, in conjunction with such an accumulation of ice, cast upon the municipality the duty of removing the obstruction on notice. If the water from the broken hydrant came upon and ran over the road, as described in the testimony of Morgan and Boland, and the ice complained of was formed by it, the city cannot escape responsibility on the plea that the ice had not "so accumulated in hills and ridges as to form an obvious physical obstruction to travel." We think, therefore, that no error was committed by the learned judge in his denial of the city's fifth and seventh points.

That the road was in a dangerous condition at the time and

place of the accident does not admit of serious question. This was abundantly shown by the evidence produced by the appellee, and was conceded by the city's witnesses. It was a condition which was attributable to the defective construction of the road, in conjunction with the ice which was negligently allowed by the city to form and remain there. The case was for the jury; it was submitted in a clear and careful charge, and the verdict is fully sustained by the evidence.

The specifications of error are overruled.

Judgment affirmed.

MUNICIPAL CORPORATIONS, DUTY OF, TO KEEP STREETS CLEAR OF ICE AND SNOW: See notes to *Collins v. City of Council Bluffs*, 7 Am. Rep. 206-208; *City of Erie v. Magill*, 47 Am. Rep. 744-747. Mere slipperiness, arising from a smooth surface of snow and ice on a sidewalk, is not such a defect or want of repair as will render a city liable in damages for injuries sustained from a fall thereon: *Cook v. Milwaukee*, 24 Wis. 270; 1 Am. Rep. 183; *Mauch Chunk v. Olin*, 100 Pa. St. 119; 45 Am. Rep. 364; *Grossenbach v. Milwaukee*, 65 Wis. 31; 58 Am. Rep. 614; *Chase v. City of Cleveland*, 44 Ohio St. 504; 58 Am. Rep. 843; *Henkes v. Minneapolis*, 42 Minn. 530. In the first of these cases, a city was held not liable for the slippery condition of a sidewalk, caused by the insufficiency of the gutters to carry off an unusually large quantity of water accumulated by artificial means, and then frozen over, unless it was guilty of some subsequent negligence or default in not repairing the sidewalk. In *Bishop v. Village of Goshen*, 120 N. Y. 337, the slipperiness was caused by the overflow of water, which was prevented from passing through a grating by the snow which the defendant's servants had cast on it in cleaning the streets, and it was held that the question of negligence was properly submitted to the jury. Nor does the mere accumulation of ice and snow in city streets constitute a "defect" or a want of "good repair": *McKellar v. Detroit*, 57 Mich. 158; 58 Am. Rep. 357. But if notice of the existence of dangerous formations has been received by the corporation, or sufficient time has elapsed to afford a presumption of knowledge of their existence and an opportunity to effect their removal, the city will be liable for resulting injuries: *McLaughlin v. Corry*, 77 Pa. St. 109; 18 Am. Rep. 432; *Broburg v. Des Moines*, 63 Iowa, 523; 50 Am. Rep. 756; *Cloughessey v. Waterbury*, 51 Conn. 405; 50 Am. Rep. 38; *Harrington v. Buffalo*, 121 N. Y. 147; *Keane v. Waterford*, 130 N. Y. 188; *Fortin v. Easthampton*, 145 Mass. 196; *McDonald v. Ashland*, 78 Wis. 251. If the formation of the ice on a sidewalk is so recent that notice cannot be imputed to the city, no liability will attach, unless it is shown that there is some structural defect, such as an excessive slope in the walk: *Taylor v. Yonkers*, 105 N. Y. 208; 59 Am. Rep. 492; *Ayres v. Hammondsport*, 130 N. Y. 665. In an action to recover for personal injuries sustained by falling on an icy sidewalk, evidence is competent to show the like condition of the walk seventeen days later, there being no evidence of any intermediate change: *Berrenberg v. Boston*, 137 Mass. 231; 50 Am. Rep. 296.

McCREARY v. BOMBERGER.

[151 PENNSYLVANIA STATE, 323.]

WILLS — POWERS UNDER — MORTGAGE. — When a devisee for life is made executrix with power to sell the real estate, a mortgage executed by such devisee will bind the remaindermen.

POWERS — EXECUTION OF — INTENTION. — When a donee of a power to sell land possesses also an interest in the subject of the power, a conveyance by him in his own name, without reference to the power, will be deemed an execution of it, if an intent to so execute it is made to appear.

W. B. Lamberton, for the appellant.

Samuel J. M. McCarrell, for the appellee.

PAXSON, C. J. The learned judge below instructed the jury to find a verdict for the plaintiff, subject to the reserved question whether there was any evidence in the case to sustain such verdict. Subsequently he entered judgment for the defendant *non obstante veredicto*.

The learned judge was of the opinion that Sarah Bomberger took but a life estate in the land in question under the will of her husband, Lewis Bomberger. The will, so far as it applies to the present case, is as follows: "I give, devise, and bequeath to my beloved wife, Sarah Bomberger, my house and lot in which I now reside, and all the household furniture and other items belonging to me not herein particularly mentioned; to have and to hold the said messuage and appurtenances and goods and chattels for and during her natural life; and at the death of my said wife all the property hereby devised and bequeathed to her as aforesaid, or so much thereof as may remain unexpended, I give and devise unto my son, Michael Bomberger, in trust for his wife, Ann Bomberger, and their heirs; and further, if at any time it should be deemed advantageous to dispose of said house and lot, my said executrix, or in the event of her death, the said aforementioned trustee, is hereby authorized and empowered to sell and dispose of the same, the proceeds to be reinvested in or secured by other real estate, subject to the same conditions."

The said Sarah Bomberger was made executrix of the will.

We need not discuss the extent of her interest in the real estate, for, conceding it to be but a life interest, it by no means follows that the mortgage did not bind the remainder. It will be noticed that the will gives her an absolute power of sale, subject to the provision that the proceeds are to be rein-

vested in or secured by other real estate. It is familiar law in this state, that an absolute and unrestricted power to sell includes a power to mortgage. It was said by Justice Sharswood, in *Zane v. Kennedy*, 73 Pa. St. 192: "We cannot regard this as an open question. It was expressly decided in *Lancaster v. Dolan*, 1 Rawle, 231, 18 Am. Dec. 625, that a power to sell does include a power to mortgage, which is a conditional sale." We need not multiply authorities upon so plain a proposition.

It was contended, however, that inasmuch as Mrs. Bomberger did not execute the mortgage in her name as executrix, but merely in her individual capacity, that it did not bind the estate in remainder. The fact that she sealed the mortgage personally, and not as executrix, will not prevent its execution being referred to the power of sale, if that is necessary to carry out the intent of the parties. It is the intention of the parties that governs the construction of the instrument: *Hay v. Mayer*, 8 Watts, 203; 34 Am. Dec. 453. The distinction settled by the decisions appears to be this: When a donee of a power to sell land possesses, also, an interest in the subject of the power, a conveyance by him, without actual reference to the power, will not be deemed an execution of it, except there be evidence of an intention to execute, or, at least, in the face of evidence disproving such an intention: *Jones v. Wood*, 16 Pa. St. 25.

We think there is abundance of evidence that Mrs. Bomberger intended to execute the power. It is true, there is no reference to it in the mortgage, and if it were an unbending rule that such a reference must appear upon the face of the papers, the defendant's position would be unanswerable. When all the circumstances surrounding the transaction are considered, we do not think it can be sustained. It must not be forgotten that the lumber for which the mortgage was given was used in the construction of a house upon the premises devised to her by her husband. This was not a literal compliance with the will, but it was a substantial one, and one of which the remaindermen have no cause to complain. She was authorized to sell the property and invest it in other real estate. Instead of doing so, she built another house upon it, and executed this mortgage to enable her to do so. She thus increased the value of the estate in remainder to that extent. The further fact that the trustee joined in the execution of the mortgage is also a pregnant circumstance to

show the intention of the parties. He could have joined for no other purpose than to bind the estate of those in remainder. If Mrs. Bomberger had intended to bind only her life estate, the joinder of the trustee was wholly unnecessary. Nothing that he could do could bind the estate of the widow. In this view, it is unnecessary to discuss the question how far the trustee was authorized to sell or mortgage the property during the lifetime of Sarah Bomberger. She had the right to mortgage it, and the action of the trustee is important only as throwing light upon the intention of the parties.

The judgment is reversed, and it is now ordered that judgment be entered for the plaintiff upon the verdict.

POWER OF SALE, WHETHER INCLUDES POWER TO MORTGAGE: See note to *Stokes v. Payne*, 38 Am. Rep. 343. If an interest and a power co-exist in the same person, an act done without reference to the power will, as a rule, affect the interest, not the power: *Phillips v. Brown*, 16 R. I. 279; but when a power is given to an executor by virtue of his office, and not to him as an individual, there being no other evidence that it was intended to be beneficial to him, the presumption is, that it was given for the purpose of being executed in the interest of the estate, and not for his own benefit: *Sweeney v. Warren*, 127 N. Y. 426; 24 Am. St. Rep. 468. The question as to the testamentary execution of a power is always one of intention; and it is not necessary that such intention shall be declared in express terms: *Cooper v. Haines*, 70 Md. 282. The intention to execute a power sufficiently appears, — 1. When there is some reference to the power in the instrument of execution; 2. Where there is a reference to the property which is the subject-matter on which the execution of the power is to operate; 3. Where the instrument of execution can have no operation, unless in execution of the power: *Terry v. Rodahan*, 79 Ga. 278; 11 Am. St. Rep. 420; *Cooper v. Haines*, 70 Md. 282.

PENNSYLVANIA COMPANY v. PENNSYLVANIA SCHUYLKILL VALLEY RAILROAD COMPANY.

[151 PENNSYLVANIA STATE, 334.]

EMINENT DOMAIN — DAMAGES — ABUTTING OWNERS. — A lot-owner whose lot does not approach nearer to the line of a railroad than from one to two hundred feet, but who is within reach of the noise and dust produced by the ordinary operation of the road, is not entitled to recover damages for the consequential injury sustained by reason of such noise and dust.

EMINENT DOMAIN — DAMAGES. — **DISTINCT TRACTS OF LAND** connected only by means of a way, either private or public, cannot be treated as one for the assessment of damages inflicted under the exercise of the right of eminent domain.

EMINENT DOMAIN — DAMAGES — ABUTTING PROPERTY. — A parcel of land some distance removed from a street, and connected with property abut-

ting thereon only by means of a private way, cannot be treated as abutting property for the purpose of claiming damages inflicted by the exercise of the right of eminent domain.

EMINENT DOMAIN — DAMAGES. — ONE WHO DOES NOT OWN LAND ABUTTING upon a street appropriated by a railroad in the exercise of the right of eminent domain is not entitled to recover damages on the ground that the street has been made inconvenient and dangerous to himself and other travelers.

EMINENT DOMAIN — DAMAGES — ABUTTING OWNERS. — Property must be actually invaded, or it must abut upon a highway that is invaded in the exercise of the right of eminent domain, to entitle the owner thereof to recover damages.

Mason Weidman, for the appellant.

Guy E. Farquhar, for the appellee.

WILLIAMS, J. The plaintiff holds the title to two pieces of real estate in the borough of Pottsville. One of these, known as the Bannan homestead, has a front on Coal Street, over part of which the defendant's road has been built. The other contains several acres, has been laid out into building lots fronting upon Jackson Street and two or three other streets, and is separated from the homestead lot by an intervening tract, known as the Whiting tract. It does not front upon Coal Street, but at its nearest approach thereto has a tier of lots from one to two hundred feet in length between its lines and the street.

In this action the plaintiff seeks to recover damages by reason of the location of the defendant's railroad over part of Coal Street. A recovery was had for the damages sustained by the Bannan homestead, but the learned judge of the court below instructed the jury that there could be no recovery of damages for the alleged consequential injury to the larger tract, because it did not abut on Coal Street, along which the railroad was built. This instruction is the error assigned.

The general question thus raised is, whether a lot-owner whose lot does not approach nearer to the line of a railroad than from one to two hundred feet, but who is within reach of the noise and dust produced by the ordinary operations of the road, may recover damages for the consequential injury sustained by reason of such noise and dust. If so, it is not easy to see why all citizens of Pottsville living near enough to the line of defendant's road to notice the noise and smoke and dust of its trains might not sustain an action. But the question is not now an open one in this state. It was fully considered and distinctly ruled in *Pennsylvania R. R. Co. v.*

Lippincott, 116 Pa. St. 472; 2 Am. St. Rep. 618; and in *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541; 4 Am. St. Rep. 659.

The appellant seems to have been of this opinion, for it sought to escape the force of the rule laid down in those cases by showing the existence of a right of way across the Whiting tract, twelve feet wide, by means of which it was alleged that the larger tract was connected with the smaller, so that they were to be treated as one.

It was further alleged that as this alley connected with the private way from the Bannon homestead to Coal Street, so that the owner had access to Coal Street by means of the alley to the private way, and thence over that way to the street, the larger tract became thereby an abutting tract upon Coal Street, with the same right to recover as though its lines had extended to and along that street.

The proposition that two distinct tracts of land connected only by means of a way, whether private or public, cannot be treated as one for the assessment of damages is well settled. If it was otherwise, how long may the way be? Over how many intervening lots or blocks or tracts of land will an "alley twelve feet wide" draw the tract of land at its farther end? If the owner of the homestead lot had other tracts connected by grants of a right of way with this alley, would the alley unite all these outlying properties with the homestead, so that they could be taken into account for an entry on the homestead lot alone?

But the plaintiff insists that, however this may be, the alley certainly makes the larger tract an abutting property on Coal Street. If it cannot be treated as part of the homestead by means of the private way, then it is brought into a position to claim damages independently as abutting on the street over which defendant's road passes. But it must be remembered that the grant under which this right is asserted is a grant of a right of way only. The way is of no higher order than a public way. It affords one means of access to Coal Street. The right of the grantee is a right to reach Coal Street by this route, so far as the rights of the grantor over the intervening land are concerned.

Now, an abutting owner owns, subject to the public right of passage, to the middle of the street on which his lot fronts, and a railroad laid upon the street may be said to take from him and to interfere with access to his property fronting the

street. But persons who are not abutting owners, and whose only right in the street is to come upon and pass over it, are affected as other citizens are by whatever affects the street. The municipal authorities of Pottsville have permitted the defendant company to occupy part of Coal Street with their tracks, reducing the width of the traveled roadway to about fifteen feet. This involves some public inconvenience, from which all who use the street must suffer. It involves some private injury, which affects lot-holders on that part of the street occupied by the railroad. The plaintiff belongs to the first of these classes. No part of his land is taken or injured. No part of his private alley has been disturbed. No cut or fill has shut it up, or cut it off from Coal Street. His land and his way are precisely as they were before. The change in his situation consists in this: that after passing over his private way to Coal Street, he finds himself in a street which has been reduced in breadth, and which has been rendered insecure for travel behind horses that are afraid of the cars, by reason of the nearness of trains. In other words, his ground of complaint is, that a public street has been made inconvenient and dangerous to travelers over it, of whom he is one. But this complaint will not give a right to recover. If it would, every citizen whose business makes it desirable for him to use Coal Street would have an equally good cause of action. It is an injury to property, to a particular piece of property as such, that gives a right of action.

As a general proposition, the property must be that which is invaded in the exercise of the right of eminent domain, or that which abuts upon a highway that is invaded. Of the latter class was *Pennsylvania etc. R. R. Co. v. Walsh*, 124 Pa. St. 544; 10 Am. St. Rep. 611. The plaintiff's property was upon a street corner in that case, and the railroad was built along one street, close to the curbstone, and across the other, thus obstructing access to the property. So in *Pennsylvania R. R. Co. v. Duncan*, 111 Pa. St. 352, the structure complained of was in the street on which plaintiff's property had a front, and extended to and within the line of the curbstone, preventing access to the plaintiff's property.

Our attention is called to *Monongahela Navigation Co. v. Coons*, 6 Watts & S. 101, as authority for the proposition that it is not necessary the property alleged to be injured should adjoin or have any physical relation to the defendant's works; but no such rule is held in that case. The facts were,

that the defendant built a dam in the Monongahela River, which caused the water to set back in a tributary of the river and drown the plaintiff's mill-wheel. Here was a connection between the act of the defendant and the loss of the plaintiff. The erection of the works of the navigation company were intended to raise, and did raise, the level of the water in the river. The injury was caused by the water thus raised and set back so far as to reach and drown the plaintiff's mill. The navigation company forced the water back against the plaintiff's wheel. The relation between cause and effect was a visible one and the injury was actual, physical, and permanent. But no such facts exist in this case. The plaintiff's land, with all that is upon it or under it, is just as it was before the railroad was built. He has the same modes of access to it as before. The only difference that can be suggested is the difference in the condition of a public highway to which he has a right of access over another man's land, and in which he has the same interest with other citizens who do not live upon it, but have access to it by means of public or private ways. This street is less desirable and less secure for travel than it was before it was made so narrow, and a part of its surface given up to the movement of trains. More care is necessary in driving upon it, and in turning into and out of it, than before, but it is still a public street, in constant use for teams and pedestrians who prefer to take the chances of travel upon it, rather than avoid it by adopting a more circuitous route. The plaintiff suffers in common with all who use it, from fear of accident. It is disagreeable to suffer fear, to be in dread that your horse may take fright, or that the horse of some other traveler may do so, and that so personal loss or harm may come to you; but I know of no ground on which the nervous or timid traveler can rest a claim for damages for such an injury. It was clear, upon the testimony, that neither the larger tract nor the private alley leading from it to Coal Street had been taken, injured, or destroyed by the defendant in the construction of its road, and the court was right in refusing to submit any question of damages done to said tract or way to the jury.

The judgment is affirmed.

RAILROAD COMPANIES — EMINENT DOMAIN — DAMAGES TO ABUTTING OWNERS. — That inconvenience caused by mere proximity to a railroad is not an element of the damages which an abutting owner can recover, see notes to

Jones v. Erie etc. R. R. Co., ante, p. 733, and *Sheehy v. Kansas City Cable Ry Co.*, 4 Am. St. Rep. 400.

EMINENT DOMAIN — UPON WHAT PROPERTY DAMAGES MAY BE ASSESSED. — As a general rule, disconnected properties are to be treated as separate and distinct properties, and damages for right of way will ordinarily be assessed on this principle: *Potts v. Pennsylvania etc. Ry Co.*, 119 Pa. St. 278; 4 Am. St. Rep. 646; *Bay City etc. Ry Co. v. Hitchcock*, 90 Mich. 533; *Northern Pac. etc. Ry v. Coleman*, 3 Wash. 228; *Cameron v. Chicago etc. Ry Co.*, 43 Minn. 75; but the mere platting of lands into blocks on a map does not divide it into separate tracts, so as to limit the owner's damages to the value of a particular block, a small parallelogram of which, as it appears on the map, is actually taken: *Currie v. Waverly etc. R. R. Co.*, 52 N. J. L. 381; 19 Am. St. Rep. 452, and note. A similar rule applies to the minor government subdivisions over which a road may pass, and the company cannot avoid payment of damages by picking out and describing in its petition the forty or eighty acre tracts through which the road is located: *Chicago etc. Ry Co. v. Baker*, 102 Mo. 553; *Chicago etc. Ry Co. v. Brunson*, 43 Kan. 371.

WILLIAMS v. FULMER.

[151 PENNSYLVANIA STATE, 406.]

RIPARIAN OWNER'S RIGHT TO WATER-POWER. — A riparian owner on a navigable river has no right to the water-power either above or below low-water mark, and cannot recover for its loss from obstruction and diversion by an adjoining owner.

RIPARIAN OWNER — DAMAGES FOR DIVERSION OF STREAM. — A riparian owner on a navigable river is entitled to recover, as against another riparian owner, for a diversion of the stream by the latter from its natural channel. If the wrong is done without malice, he must restore the stream to its natural channel, or make compensation for the loss; but if malice is shown, exemplary damages may be recovered against him.

R. E. Wright, for the appellant Williams.

Edward Harvey and John Rupp, for the appellant Fulmer.

WILLIAMS, J. These are cross-appeals from the same judgment, and may be best considered together. The same parties were before us in 1888 with substantially the same questions, and the case is reported in 122 Pa. St. 191; 9 Am. St. Rep. 88.

The plaintiff is a manufacturer of school slates. His factory is situated on the west bank of the Lehigh River, and prior to 1883 the machinery was propelled by water-power. This was obtained by means of a dam thrown across an arm of the river that flowed between an island and the mainland, on which the factory was located. The dam raised the sur-

face of the water above it from one to two feet, which was sufficient to furnish the power required for the factory.

The defendant owns and operates a slate quarry on land immediately above that of the plaintiff. He has been dumping the refuse from his quarries for many years into the river, a little way above the plaintiff's factory. He had in this manner filled up the channel of the arm of the river far beyond low-water mark, and had nearly closed the channel into which it flowed. The water was by this means diverted from the front of the plaintiff's land, and thrown into the channel on the opposite side of the island, and the water-power of the plaintiff was completely destroyed.

This action was brought to recover damages for the destruction of the water-power. The defense rested on the general proposition that the Lehigh River was a navigable public highway belonging to the commonwealth; that the plaintiff, as a riparian owner, had no right to its waters or the power to be obtained from them, but that the state had granted the exclusive right to such water-power to the Lehigh Navigation Company, which was still its owner. We held that the defense was well taken, so far as the water-power was concerned; but that the plaintiff was nevertheless entitled to recover for any injury he had sustained by reason of the diversion of the stream from its natural channel along the front of his land; and if any such diversion had been affected with malice toward the plaintiff, or for the purpose of inflicting injury upon him, exemplary damages might also be given. Another trial has now taken place, resulting in a recovery for the plaintiff, although for a smaller sum than before. From this judgment both parties have appealed. The plaintiff asks us to reconsider our former holding, so far as it relates to the water-power, and allow a recovery, at the very least, for the loss of such power as the water flowing between high and low water marks would afford him, in addition to the damages which he has recovered as a riparian owner. The defendant, on the other hand, asks us to reconsider our judgment so far as to deny the plaintiff any right to recover damages for the diversion of the stream, and hold him to be remediless. We must decline to do either. The plaintiff is without title to the water or the power to be derived from it, whether above low-water mark or below it. He used it for years, it is true, but the right to use it was in the navigation company, the grantee of the commonwealth, and not in him. His use of it could have been

stopped at any time. He cannot recover for that to which he has no title. But he was the owner of land lying upon a navigable stream. The advantages of his location were inseparable from the ownership of the land, and if they increased its desirability, or added to its value for purposes of business or of pleasure, they were his property as truly as the land itself.

The diversion of the stream was an injury to his land that was direct, peculiar, and not shared with the general public. It was as clearly actionable as the diversion of a stream passing over his land. Whoever brought about such diversion so as to deprive him of the advantages of his location, whatever they were, inflicted a pecuniary wrong upon him. The manner in which the diversion is brought about is not important. It might be accomplished by means of elaborate works arranged to carry the stream elsewhere, or it might be effected by filling up the channel so as to compel it to seek another. The result accomplished and the injury inflicted would be the same. The lower riparian owner would be deprived of the natural advantages which ownership of the land at that point gave him, by the unlawful act of another; and he would have a right to call upon the wrong-doer to repair the wrong done him, by restoring the stream to its channel or making compensation for its loss. The learned trial judge followed the rule laid down in *Williams v. Fulmer*, 122 Pa. St. 191, 9 Am. St. Rep. 88, and tried the cause with discrimination and ability.

The assignments of error in both appeals are overruled, and the judgment affirmed.

WATERCOURSES — WATER-POWER ON NAVIGABLE STREAM — RIPARIAN OWNER'S RIGHT TO. — A riparian owner upon a navigable stream has no right to erect a dam to turn the water to his mill without a grant from the commonwealth, and if he does so, he is a trespasser, and acquires no title to the water-power resulting therefrom: *Fulmer v. Williams*, 122 Pa. St. 191; 9 Am. St. Rep. 88, and note. For the destruction of a dam across a floatable stream by logs placed therein, there can be no recovery, because the land-owner has no right to maintain his dam in such a manner as to interfere with the right of the public to float logs and other products down the stream: *Gaston v. Mace*, 33 W. Va. 14; 25 Am. St. Rep. 848, and note. In Michigan, a riparian proprietor on a navigable stream owns to the middle of the stream, and can use his land covered by water for any purpose, so long as he does not unreasonably interfere with the right of navigation, or damage other riparian owners above or below him: *Grand Rapids v. Powers*, 89 Mich. 94; 28 Am. St. Rep. 276, and note. And the rule seems to be the same in New Hampshire: *Connecticut River Lumber Co. v. Olcott Falls Co.*, 65 N. H. 290.

OIL CITY v. OIL CITY TRUST COMPANY.

(181 PENNSYLVANIA STATE, 454.)

POLICE POWER — LICENSE TAX. — What business or occupation so far affects the public welfare and good order as to require to be licensed is a matter of legislative consideration and control, which, when exercised in good faith, cannot be reviewed by the courts.

POLICE POWER — LICENSE TAX ON BANKING — PRESUMPTION. — When an ordinance on its face purports to impose a license tax on the occupation of banking under an exercise of the police power, it will be presumed that it imposes an occupation tax, and not a tax for revenue, if its good faith and the reasonableness of the amount imposed are not questioned.

POLICE POWER — LICENSE TAX ON BANKS. — Banks may be subjected to a license fee or occupation tax by municipalities under express legislative authority; but in the absence of such authority, they are not so liable.

POLICE POWER — LICENSE TAX ON BANKS — CONFLICT OF STATUTES. — A statute exempting banks from taxation on payment of a state tax does not exempt them from the power of cities to impose a license fee or occupation tax as incidental to the exercise of the police power under another statute expressly authorizing the imposition of such license tax.

ASSUMPSIT to recover a license tax against state banks imposed by a municipal ordinance. Judgment for plaintiff. Defendant appealed.

F. W. Hays, for the appellant.

Isaac Ash and P. M. Spear, for the appellee.

MITCHELL, J. The learned judge rightly held that the test of the charge in controversy was, whether it was a license fee under the police power or a tax for revenue. On its face, it purports to be a license fee on the occupation of banking, and though we may suppose it was not imposed without an eye to the increase of revenue, yet its good faith and the reasonableness of its amount are not questioned here, and the presumption therefore is, that it is what it professes to be: *Johnson v. Philadelphia*, 60 Pa. St. 445.

The appellant argues that banks are not specially subjects of the police power, and, quoting Dillon on Municipal Corporations (ed. 1890, sec. 141), that "laws and ordinances relation to the comfort, health, convenience, good order, and general welfare of the inhabitants are comprehensively called police laws or regulations," asks, Wherein does the regulation or licensing of the business of banking relate to the comfort, health, or good order of the community? We are not required to answer this question further than to say that it is a matter for legislative determination. Certain occupations, such as

tavern-keeping, theatrical and kindred shows, public conveyances, barges, etc., were regulated by license in England before the settlement of Pennsylvania, and the colonists brought with them the idea of state control of such matters. Others, such as auctioneers, hawkers, and peddlers, etc., were licensed by statute so early and so continuously in the history of our legislation that their appropriateness as subjects of license became familiar as part of the common law of Pennsylvania. Thus auctioneers were classed with hawkers, peddlers, and petty chapmen in "an act for regulating peddlers, vendues," etc., passed February 14, 1729-30, and have been subject to license regulations almost if not quite continuously from that date.

Banks are not so obviously within the sphere of police regulations as to be familiar to us as subjects of municipal license, yet it might not be any more difficult to name reasons why they should be than in the case of auctioneers, had not long familiarity with the licensing of the latter led us to accept it without question. What business or occupations so far affect the public welfare and good order as to require to be licensed is a matter of legislative consideration and control, which, when exercised in good faith, are outside of the jurisdiction of the courts.

The ordinance in present controversy rests upon the authority of the act of May 23, 1874 (P. L., p. 239, sec. 20, cl. 4), which in express terms confers on cities of the third class power "to levy and collect license tax on auctioneers, . . . bankers," etc. As already said, the good faith of the ordinance as an exercise of the delegated authority, and the reasonableness of the amount for the lawful purpose, not being questioned, we cannot go behind the clear statutory grant of power.

The act of June 30, 1885 (P. L., p. 193, sec. 3), provides that as to any bank electing to pay into the state treasury a tax of six tenths of one per centum upon the par value of all its shares, "the shares and so much of the capital and profits . . . as shall **not** be invested in real estate shall be exempt from all other **taxation** under the laws of this commonwealth." The word "**taxation**" here is used in its ordinary and proper meaning of a charge for the support of the state, or some of its subordinate municipal agencies, and clearly does refer to a charge merely incidental to the exercise of the police power. The act therefore does not exempt banks from the power of

cities to impose a license tax under the act of 1874, and the learned judge below was right in so holding.

A distinction, however, has been made here to which the learned judge does not refer in his opinion, and to which his attention was probably not called. The judgment is for the license tax for the years 1886 to 1890, inclusive. As already said, banks are not intrinsically and obviously subjects of license under the police power, by the common law of this state. They become such by statute only, and the license fees recovered in the present case rest on the authority of the act of 1874. But that act was supplied and repealed by the act of May 23, 1889 (P. L. 277). The act of 1874 confers the taxing powers for revenue in clauses 1, 2, and 3 of section 20, P. L. 238, the license tax power in clause 4, and then, in the following clauses, enumerates expressly the most usual and important police powers, over tippling-houses, games and gambling-houses, sanitary and quarantine regulations, etc. In this act the licensing of banks is apparently intended to be classed under police powers. The act of 1889, however, enumerates and classifies the various municipal powers more fully and more accurately. Article 5, section 3, clauses 1, 2, and 3, of the act of 1889 follow closely the language of clauses 1, 2, and 3 of section 20 of the act of 1874, and clause 4, like that of the prior act, relates to license taxes, but makes this important change in the language: "to levy and collect, for general revenue purposes, a license tax," etc., enumerating many kinds of business and occupation, but significantly omitting shows, theaters, etc., included in the corresponding section of the act of 1874. Then follow a number of clauses relating also to the revenue, as power to borrow money, to fund indebtedness, rates of interest, etc., and it is not until clause 16 that the usual police powers are reached, among which, in clause 25, is included the power "to license and collect license tax from skating-rinks, theaters," etc.

By the express language of clause 4, above referred to, the authority given to cities by this act to license bankers is for general revenue, and as if to emphasize the change of legislative purpose, the grant is transferred from its previous place in the enumeration of police powers to a place among the powers of taxation for revenue. It is therefore unquestionably a tax in the general sense, and we have to consider whether appellant is exempted from it by the acts of June 30, 1885, and June 1, 1889. Of this there can be no doubt. The language

of section 3 of the act of 1885 has already been quoted. It exempts from "all other taxation under the laws of this commonwealth." The words could not be broader. They apply not only to taxation for state but also for local purposes, and that they were intended to do so is clear from the exception of capital, etc., "not invested in real estate." It is matter of public history that there was no state tax on real estate in 1885, or for many years prior; and if exemption from local taxation was not intended, it is hardly supposable that the legislature would have inserted an entirely unnecessary and useless clause. But to put the matter beyond all possible question, the act of June 1, 1889 (P. L., p. 433, sec. 25), changes the language previously used, and makes the exemption "from local taxation, under the laws of this commonwealth."

The result therefore is, that banks are only subject to license tax by municipalities by virtue of express legislative authority; that the only authority shown in cities of the third class since the act of 1889 is to license as a tax for revenue purposes; and that as to such tax the appellant was exempt during the years 1889 and 1890.

The judgment must therefore be reversed as to these years; but as the facts are all set out in the point reserved, we can enter the proper judgment without the delay and expense of a new trial.

Judgment reversed; and now judgment entered for plaintiff below, \$150 for the license tax for the years 1886, 1887, and 1888. Costs of this appeal to be paid by appellee.

MUNICIPAL CORPORATIONS. — POWER TO TAX OCCUPATIONS: See extended note to *Robinson v. Mayor*, 34 Am. Dec. 638; note to *Ex parte Gregory*, 54 Am. Rep. 523. A statute authorizing municipal corporations to regulate such callings as the public good may require will empower them to exact a license for revenue purposes, if that construction is not inconsistent with the general legislation of the state and its whole charter: *Ex parte Frank*, 52 Cal. 606; 23 Am. Rep. 642; *White v. Rockhill*, 34 S. C. 242. Where a state has not declared a certain business unlawful, nor conferred on municipal corporations the power to do so, the city has no power to require a license fee of persons engaged in such occupation; *Shuman v. Fort Wayne*, 127 Ind. 109.

MUNICIPAL CORPORATIONS. — LICENSING NATIONAL BANK. — A city has no power to exact a license fee from a national bank; *Carthage v. First Nat. Bank*, 71 Mo. 508; 36 Am. Rep. 494.

HANCOCK v. McAVOY.

[151 PENNSYLVANIA STATE, 460.]

EJECTMENT WILL LIE ONLY FOR THINGS whereof possession may be delivered, and it will not lie for a mere license, an incorporeal hereditament, right of way, or an easement.

EJECTMENT FOR RIGHT OF INTERMENT IN BURIAL LOTS. — The exclusive right of sepulture in the burying-ground of a cemetery corporation subject to its regulations is a mere license, and will not support an action of ejectment.

Henry J. Hancock and John G. Johnson, for the appellant.

Silas W. Pettitt and John R. Read, for the appellee.

STERRETT, J. As well stated by appellant in the opening sentence of his argument, "the question first presented for decision is, whether the interest conveyed under the original deed of Tilford to Lisle is such an interest in land as will support an action of ejectment."

The thing conveyed by the deed referred to, as the same is described therein, is, "the exclusive and entire right of interment or sepulture in all and every of those two hundred burial lots in the Philadelphia Cemetery, situate," etc., "marked in the map or plan of said cemetery with the numbers 5, 9," etc.; "together with all and singular the ways, avenues, passages, rights, liberties, privileges, improvements, hereditaments, and appurtenances whatsoever thereunto belonging or in any wise appertaining, and the reversions and remainders thereof; to have and to hold the same, with the appurtenances, unto the said John M. Lisle, his heirs and assigns, to and for the only proper use and behoof the said John M. Lisle, his heirs and assigns forever, for the uses and purposes of sepulture only, and to and for no other use, intent, or purpose whatsoever, subject to all the rules, regulations, conditions, and restrictions contained and set forth in the articles of association made and adopted, or which may hereafter be made and adopted, by the corporators or managers of said cemetery for the government of lot-owners or visitors to the cemetery, and the burial of the dead, and in and by any by-laws made and adopted, or which may hereafter be made and adopted, in pursuance of the said articles of association, or of the act of assembly incorporating said company."

It thus appears by the deed that all the vendee acquired thereunder was "the right of interment or sepulture" in the lots described therein, and declared to be held "for the uses

and purposes of sepulture only, and to and for no other use, intent, or purpose whatsoever." The right, thus sharply defined and limited, is also subject to all the rules, regulations, conditions, and restrictions contained and set forth in the articles of association made and adopted, or which might thereafter be adopted, by the corporators or managers of the incorporated cemetery company.

The language of the deed evidently contemplates possession and general control of the cemetery grounds, etc., by the company. The grantee in the deed acquired no such interest in the lots, nor such right of possession, as will support an action of ejectment. That action will not lie for a mere license, an incorporeal hereditament, nor for a mere right of way, nor an easement: 6 Am. & Eng. Ency. of Law, 232; Adams on Ejectment, 16. As was said in *Black v. Hepburne*, 2 Yeates, 333: "Ejectment will only lie for things whereof possession may be delivered by the sheriff." If a recovery in ejectment, founded on a mere right or license such as that acquired by the grantee in the deed above referred to, were permitted, how could the sheriff, under a writ of *habere facias*, put the plaintiff in possession, without interfering with the rights, powers, and duties of the cemetery corporation? In *Kincaid's Appeal*, 66 Pa. St. 411, 5 Am. Rep. 377, one of the plaintiffs held a paper certifying that he was "entitled to two lots in the burying-ground, . . . to have and to hold the said lots for the use and purpose and subject to the conditions and regulations in the deed of trust to the trustees of said church." It was held that this was not a grant of any interest in the soil; that it was the grant of a license or privilege to make interments in the lots described, exclusive of others, so long as the ground should remain the burying-ground of the church; that while the license continued he could perhaps maintain trespass or case for any invasion or disturbance of it, whether by the grantors or by strangers, etc.

That case was cited approvingly in *Craig v. First Presb. Church*, 88 Pa. St. 42, 32 Am. Rep. 417, in which it was also held that the right of sepulture in the burying-ground of a church is not an absolute right in the soil, but a mere license or privilege.

In *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Pa. St. 173, the grant to the defendant was of the exclusive right and privilege of boring for oil, etc., upon a farm. Subsequently, by partition, the title became vested in another, who conveyed

to plaintiff. It was held that the grant was a mere incorporeal hereditament, and consequently ejectment could not be maintained. Referring to the grant, which was of "the exclusive right and privilege of boring for salt, oil, or minerals" upon the McClintock farm, Mr. Justice Sharswood says: "It was therefore, as in *Funk v. Haldeman*, 53 Pa. St. 239, the grant of a mere incorporeal hereditament. Indeed, we do not understand this to have been controverted in the court below, nor has it been made a question in this court. It follows that the only remedy which the plaintiffs had for the disturbance of their right was an action on the case. Ejectment they certainly could not have maintained." *Funk v. Haldeman*, 53 Pa. St. 239, above cited, is substantially to the same effect.

It follows from what has been said that the right of sepulture, etc., was not an interest in the land, such as will support an action of ejectment. It is therefore unnecessary to consider whether the court erred in directing a verdict for defendant, and in other respects, or not. If, on the case presented by the plaintiff, he had no right to recover in an action of ejectment, he was not injured by any of the alleged errors of which he complains.

Judgment affirmed.

EJECTMENT — FOR WHAT THINGS ACTION WILL NOT LIE. — A grant of oil which may be found in a tract of land is not a grant of a corporeal hereditament for which ejectment will lie: *Dark v. Johnson*, 55 Pa. St. 164; 93 Am. Dec. 732, and note. Ejectment does not lie for flooding lands by a dam: *Edward v. Findley etc. Mining Co.*, 74 Ga. 520; 58 Am. Rep. 445, and note. Ejectment will not lie for a railroad by one having title only to the right of way: *Tennessee etc. R. R. Co. v. East Alabama R'y Co.*, 75 Ala. 516; 51 Am. Rep. 475. The action of ejectment cannot be maintained to recover a mere easement: *Union Canal Co. v. Young*, 1 Whart. 410; 30 Am. Dec. 212, and note; *Fritsche v. Fritsche*, 77 Wis. 270. Ejectment will not lie to enforce the performance of a contract which is the consideration of a deed: *Krebs v. Stroud*, 116 Pa. St. 405. The grant of a right to quarry and remove limestone from land for a specific purpose passes an incorporeal hereditament. Such right is an interest in or a right arising out of land, and, as such, constitutes a foundation for an action of ejectment under the Virginia code: *Reynolds v. Cook*, 83 Va. 817; 5 Am. St. Rep. 317, and note.

EJECTMENT — BURIAL RIGHT IN CEMETERY LOTS. — The purchaser of a lot in a cemetery for "burial purposes" does not take any title to the soil; and an act directing the vacation of the cemetery, and the removal of the bodies, is not an infringement of his rights: *Kincaid's Appeal*, 63 Pa. St. 411; 5 Am. Rep. 377. To the same effect is *Rayner v. Nugent*, 60 Md. 515. See also *Craig v. First Presb. Church*, 88 Pa. St. 42; 32 Am. Rep. 417, and extended note 424.

KEHLER v. SCHWENK.

[151 PENNSYLVANIA STATE, 505.]

MASTER AND SERVANT—NEGLIGENCE TOWARD MINOR EMPLOYEE—EVIDENCE.—In an action by a minor employee to recover for personal injury, alleged to have been caused by the negligence of the master, witnesses who show a practical and actual knowledge as to what was necessary to be done by plaintiff in the performance of his services may testify that, in their opinion, owing to the size and strength of the plaintiff, it was absolutely necessary for him to perform the work in the manner in which he was performing it at the time of the accident, and thus relieve him from the charge of contributory negligence.

MASTER AND SERVANT—NEGLIGENCE TOWARD MINOR EMPLOYEE—EVIDENCE.—In an action by a minor employee to recover for injuries received while running a dumper for his master, evidence that the dumper-track had rotten ties, loose rails, and projecting ends of ties, with holes in the ground between the ties, both inside and outside the rails, and was in such a condition of non-repair as would most probably and naturally occasion the stumbling of any person, young or old, while engaged in the performance of so hazardous a service, is admissible as tending to show negligence on the part of the master.

MASTER AND SERVANT—NEGLIGENCE TOWARD MINOR EMPLOYEE—EVIDENCE.—In an action by a minor employee to recover for injuries received while operating a dumper for his master, evidence that a different kind of dumper was in general use at other collieries, and that it was entirely free from the arrangement which constituted the dangerous character of the one in use at defendant's colliery, is admissible as tending to show negligence on the part of the master in not furnishing safe machinery and appliances with which to do the work.

MASTER AND SERVANT.—MINOR EMPLOYEES who have sufficient judgment to know that an employment is dangerous, and nevertheless engage in it voluntarily, cannot recover, notwithstanding their youth; but if, because of their youth, they have not sufficient knowledge to appreciate the danger, or to know better than to engage in so dangerous a service, then they cannot be deemed to be guilty of contributory negligence.

MASTER AND SERVANT—MASTER'S LIABILITY—ASSUMPTION OF RISKS.—While a master is not liable for accidents occurring to his servant from the ordinary risks and dangers incident to the business in which he is engaged, yet when the master voluntarily subjects his servant to dangers such as in good faith he ought to provide against, he is liable for any accident arising therefrom.

MASTER AND SERVANT.—MASTER IS BOUND TO FURNISH AND MAINTAIN SUITABLE INSTRUMENTALITIES for the work or duty which he requires of his employees, young or old, and failing in this he is liable for any damages flowing from such neglect of duty. When the servant, in obedience to the order of the master, incurs the risk of machinery, which, though dangerous, is not so much so as to threaten immediate injury, or when it is reasonably probable it may be safely used only by extraordinary caution or skill, the master is liable for resulting accident.

MASTER AND SERVANT—SAFE MACHINERY—ASSUMPTION OF RISK.—Every servant has a right to suppose that his master has provided such guards and means of protection from injury, in the use of machinery,

tools, and appliances, as are usual and reasonably necessary for his safety, and he cannot be held to have assumed risks attendant on their absence, unless such absence is apparent, or his attention has been called to it.

MASTER AND SERVANT — DUTY TO MINOR EMPLOYEES. — It is the duty of every master to take notice of the age and ability of his young employees, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they should not be exposed. Failing in this duty, the master is liable for injury resulting therefrom.

MASTER AND SERVANT — MINOR EMPLOYEES. — In actions by young servants against their employers, the inexperience of the servant and want of specific instruction as to the dangers of the service are recognized as sources of liability against the master.

MASTER AND SERVANT — MINOR EMPLOYEES. — When a minor employee is very young, with no knowledge by experience or instruction as to the risks of a particularly dangerous service, in which he was not at first employed, but into which he was urged by the master against his will, and the appliance from which the injury arose was only in partial use, while another simple device which practically removed all danger was in extensive use, the master is guilty of negligence, and the servant is entitled to recover.

C. M. Clement, S. P. Wolverton, W. H. M. Oram, and W. B. Faust, for the appellant.

P. A. Mahon and Veris Auten, for the appellee.

GREEN, J. First and third assignments of error. The witnesses Milton Haas and Daniel Specht had quite considerable experience in driving mules on the dirt-bank of the defendant, for the purpose of dumping coal-dirt over the bank at the end of the dump. Haas, after saying he was employed by defendant at the colliery in question, and was on the dirt-bank the day of the accident, testified: "I was acquainted with the construction of the dump-car and the attachment for the mules." He then described fully the whole construction of the car and the attachment. He said further: "I drove a mule on this dirt-bank. Sometimes it was part of my work to unhitch the mule. There was a grade at the end of the dirt-bank, where the cars were dumped. It was necessary to make the mule go on a trot, in order to get the dumper up to the head-block. If the mule wasn't driven pretty rapidly, the dumper wouldn't go up. . . . It was necessary to unhitch the mule before the dumper arrived at the end of the bank, because the mule could n't go clear out, or he would have went head over heels down the bank. The person driving the mules, in order to unhitch, was obliged to go in front and take hold of the chain with one hand, and with the other

hand unhook the spreader. Whenever I unhooked it I had to get right in front of it. I was obliged to get in front of the car between the rails. The car was moving rapidly while I was doing that, because the mule had to start on a trot." The witness further said: "I knew Daniel Kehler's size at that time. He was a small boy for his age. Q. What was his physical strength for a boy his age? A. I don't know that; he was very light, — light frame."

Such being the preliminary testimony of the witness, counsel for plaintiff proposed to ask him whether a boy of the size and strength of the plaintiff could have unhitched the mule from the car in any other manner than that described by the witness. This proposed proof was objected to by the defendant's counsel, but the court overruled the objection, and admitted the offer. Whereupon the question was put to the witness, who answered: "I don't think he could." It is evident that the subject-matter of this testimony was of serious importance to the plaintiff's case. A favorable answer would relieve him from the charge of contributory negligence, and it would also tend to support his allegation that he did what he was obliged to do, in order to perform the service he was set to do by the plaintiff. The witness had shown ample knowledge of the whole situation; he knew what had to be done, from his personal experience; the information to be communicated by the answer was something which the jury ought to know, to dispose of the case intelligently. It was not a mere opinion of the witness that was sought, but his actual knowledge of what had to be done by the plaintiff, in order to carry out his employer's directions, and perform the duty assigned to him. We have no doubt it was entirely competent to make this proof. In fact, we do not see how the fact as to the character of the plaintiff's service, and the actual things he was obliged to do, could be proved in any other way.

The same remarks are true, in a still more eminent degree, of the testimony of Daniel Specht. He also developed a most practical and actual knowledge as to what was necessary to be done in the performance of the plaintiff's service. He said it was absolutely necessary for the plaintiff to get in between the rails, in order to unhitch the chain, and he further said that the plaintiff had neither size nor strength to unhook the mule while outside the rails. We think the offer of proof of this witness, also, was properly received, and we therefore dismiss the first and third assignments of error.

Second assignment of error. The condition of the track upon which the plaintiff was obliged to perform his duties was, necessarily, an element in the question of the defendant's negligence in furnishing the appliances which the plaintiff was obliged to use. We not see how that feature of the case can be eliminated from the inquiry. We said as much as this in the former hearing of this case. The plaintiff, testifying as to the facts of the injury, said: "I fell in the track and one wheel of the dumper run over me; I was trying to unhook the mule and I fell; I was between the rails, in front of the car, in the act of unhitching the mule." He also said: "After the mule turned out that way, I was laying right under here; I don't know how I happened to fall; I guess I stumbled over something; I was running in front of the car, and I had hold of this chain, and I fell between the wheels on the track." And again: "Certainly, it was necessary to get hold of the chain, so you would be right there, so you could n't miss it; you had to run, had to have something to steady yourself, because it was full of holes on the outside and inside of the rail. We used to have hold of this stretcher with one hand, and with the other hand we unhooked the chain as soon as we had slack enough."

There was some evidence that it was the duty of the persons running the dumper to keep the track in order, though all of these boys that were engaged in this service, Haas, Specht, and the plaintiff, testified that they were not instructed to do so. But if it were clearly proved that such was the rule at this place, the plaintiff could not possibly be charged with the consequences of not observing it, because he had only been put upon this service the day before, and he certainly could not be held responsible for any breach of duty in this respect. Now, if the track had rotten ties, loose rails, and projecting ends of ties, with holes in the ground between the ties, both inside and outside the rails, it was in such a condition of non-repair as would most probably and naturally occasion the stumbling of any person, old or young, while engaged in the performance of so hazardous a service. Under this state of the testimony, the jury would have been quite at liberty to infer that the condition of the track was the occasion of the boy's falling. It was therefore proper, in our judgment, to admit evidence of the condition of the track at the time of the accident, and we dismiss the second specification of error.

Fourth and fifth assignments. We are clearly of opinion

that the testimony of McEliece was properly admitted. It related to the very subject, both of the general use of this kind of a dumper and hitch, and the existence of the defects complained of by the plaintiff in the structure itself. This is the very essence of the plaintiff's case. The witness had worked at several different collieries, and said he had never seen a contrivance of this kind in use. He also described the kind that was in use at those collieries, and showed that they were entirely free from the arrangement which constituted the dangerous character of the one in use at the defendant's colliery. It matters not that other persons testified that there were other collieries at which this same kind of dumper was used. The whole of the testimony on both sides raised a question of fact as to the generality of the use of either kind, and especially as to the dangerous character of the one in use at this colliery, and the decision of that question was for the jury.

We think the remaining assignments of error can be considered together. The case was tried upon an allegation by the plaintiff that the defendant was guilty of culpable negligence in putting him at work upon a service, dangerous in its character, with an appliance which was entirely insufficient for his protection, and was not in general use for such a purpose, and he being at the time too young in years and too weak in body to be put upon such a service, and further, that the dangers were not pointed out to him, and he was not instructed how to avoid them. The cause was most carefully, and as we think correctly, tried by the learned court below, with all due cautions to the jury, and giving the defendant the full benefit of all the restrictions and limitations upon the liability of an employer in an action by an employee. The jury were instructed that if the plaintiff had sufficient judgment and sense to know that the employment was dangerous, and nevertheless voluntarily engaged in it, he was guilty of contributory negligence, and could not recover, notwithstanding his youth. The court also said to the jury that if the plaintiff was of such tender years, or did not have sufficient sense to appreciate the danger, and know better than to engage in so dangerous a service, then he would not be guilty of contributory negligence.

On the trial it was clearly proved, and not contradicted, that the plaintiff was a little past fourteen years of age at the time of the accident, and abundant proof was given that he was of small size for his age, and physically weak. It was also fully proved, and not contradicted, that he was employed

to do service as a slate-picker, and entered upon and performed that service, but that the day before the accident he was directed by the agents of the defendant to go out upon the dirt-heap and drive the dumping-car. It was proved by the plaintiff and his father that when he was directed to do this work both he and his father objected to it, the plaintiff complaining that he was sore and stiff all over, and that the work was too heavy for him. It was also proved by the plaintiff, and not contradicted, that he had no previous experience at driving a dump-car, until he was set to work the day before the accident, and that no one explained to him the danger of the service, or gave him any instruction how to perform it, or showed him how to avoid the danger. The character of the service, and the manner in which it was necessary to perform it, and the necessity of the plaintiff's getting in between the rails of the track while the car was running, in order to unhitch the spreader, because of his inferior size and strength, was fully proved, and if there was any opposing testimony on this subject, a question of fact arose which it was necessary to submit to the jury.

We are constrained to say that, under all the testimony, the jury were entirely justified in finding that the character of the service which the plaintiff was required to perform was highly dangerous for any one, and especially so for the plaintiff, on account of his youth and physical weakness. There was ample proof that there was another mode of constructing the attachment, by means of which the spreader would detach itself the moment the mule turned about in order to let the dumper run onto the end of the track, and that dumpers of that character were in use at quite a number of collieries named by the witnesses, who described them. On the other hand, proof was given by the defendant that the appliance used at the defendant's colliery was the same in structure as those used at a number of other collieries named by the witnesses, and thus a question of fact was raised as to the generality of the use of the kind of dumper which was employed at the defendant's colliery. This question also was referred to the jury, with the instruction that if they found that **this** method of attachment was in use by people engaged in the business, the defendants were not guilty of negligence in using it. It seems to us that all the rights of the defendants, as employers of the plaintiff, were carefully guarded by the learned court below in the general charge and in the answers

to points, and the simple question remaining is, whether, upon the combination of facts constituting the plaintiff's case as set out in the *narr.*, there can be a recovery.

Upon this question, we think the case comes within several of our decisions which authorize a recovery in such circumstances. Thus in the case of *Patterson v. Pittsburgh etc. R. R. Co.*, 76 Pa. St. 389, 18 Am. Rep. 412, we said: "It is true, the master is not responsible for accidents occurring to his servant from the ordinary risks and dangers which are incident to the business in which he is engaged; for in such case the contract is presumed to be made with reference to such risks. But, on the other hand, where the master voluntarily subjects his servant to dangers, such as, in good faith, he ought to provide against, he is liable for any accident arising therefrom. . . . The servant does not stand on the same footing with the master. His primary duty is obedience, and if, when in the discharge of that duty, he is damaged, through the neglect of the master, it is but meet that he should be recompensed. The general principle, as recognized by our own cases,—*inter alia*, *Caldwell v. Brown*, 53 Pa. St. 453, and *Frazier v. Pennsylvania R. R. Co.*, 38 Pa. St. 104; 80 Am. Dec. 467,—is, that the employer is bound to furnish and maintain suitable instrumentalities for the work or duty which he requires of his employees, and failing in this, he is liable for any damages flowing from such neglect of duty. . . . But where the servant, in obedience to the requirements of the master, incurs the risk of machinery, which, though dangerous, is not so much so as threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the rule is different. In such case the master is liable for a resulting accident."

The principle of this decision would exonerate the plaintiff in the present case from a charge of contributory negligence in engaging in a palpably dangerous service, even if he were a full-grown adult, because there was other testimony to the effect that the appliance might be used with safety although apparently dangerous, but when his youth and physical weakness are considered, and the fact that he was ordered to do this work, and that he objected to doing it, and went reluctantly to the service, it cannot be doubted that he is entirely free from any charge of contributory negligence, and also that the master became subject to all the risk of an accident. He was but little more than a child, either in years or in strength,

and could not be expected to have the will-power of a full-grown man in resisting his master's orders. He cannot be held, therefore, as one who voluntarily engages in a dangerous service, especially by a master who specifically directed him to do the hazardous work. On the contrary, the very fact of the plaintiff's youth and weakness is one of the elements that go to make up the charge of negligence on the part of the defendant in putting such a person upon such a service. It seems to us, the master, in such circumstances, and not the servant, must be held to have assumed the risks of the service.

The case of *Rummel v. Dilworth*, 181 Pa. St. 509, 17 Am. St. Rep. 827, goes much further than is necessary to sustain the plaintiff's action. There the plaintiff was seventeen years of age, and the service assigned to him was not manifestly dangerous on account of the manner in which it had to be performed. The danger arose from the absence of protective appliances, which, had they been present, would have prevented the accident. The plaintiff was employed as a drag-down, but, of his own accord, was acting as a roller when he received his injury, and he therefore assumed the risks of the latter service. But we held that if he was permitted to act as a roller, and that was for the jury, "he was entitled to instruction and protection in the same manner as though he had been employed as a roller." We also held, as to every workman, that "he has the right to suppose that his employer has provided such guards and means of protection from injury in the use of the machinery, tools, and appliances as are usual and reasonably necessary for his safety, and he cannot be held to assume the risks attendant on their absence, unless such absence is apparent, or his attention has been called to it. If the business is one with which he is not familiar, he has a right to expect that its dangers will be pointed out to him, and that he will be instructed in those things necessary for him to know in order to his own safety. He cannot be held to assume the risk of dangers of the existence of which he has no knowledge."

We held, also, that, "in the case of young persons, it is the duty of the employer to take notice of their age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they should not be exposed. The duty, in such cases, to warn and instruct grows naturally out of the ignorance or inexperience of the

employee, and it does not extend to those who are of mature years, and who are familiar with the employment and its risks."

It will be seen from this decision that in actions by young persons against their employers, we recognize as sources of liability the inexperience of the servant, and the want of specific instruction as to the dangers of the service, and we suspend the rule that the servant assumes the risk of the service when he has not knowledge by experience or by specific instruction. All these sources of liability existed in the present case. The plaintiff was very young; he had no knowledge, by experience or by instruction, as to the dangers of the service; the service was, in reality, highly dangerous; the plaintiff was not employed to engage in this particular service, but in another, and was urged into it against his will; the appliance from the use of which the injury arose was only in partial use; and the testimony disclosed a perfectly simple device, in extensive use, which practically removed all danger. The most of these facts were proved without contradiction, and ample testimony was given as to all of them. In such circumstances the case was clearly for the jury, and, as it seems to us, the verdict was entirely justified by the evidence. We are of opinion that there was no error in the charge nor in the answers to points, and therefore think the judgment should be affirmed.

Judgment affirmed.

MASTER AND SERVANT — EVIDENCE AS TO CONDITION OF MACHINERY. — In an action for damages, brought for personal injury caused by defective machinery, it was held that one previously injured by the same machinery could testify as to how he was injured, as such evidence bore upon the condition of the machinery: *McCarragher v. Rogers*, 120 N. Y. 526.

MASTER AND SERVANT — DANGEROUS MACHINERY — EXISTENCE OF SAFER. — When the machinery furnished by a master is of the kind in common use, he will not be liable for an injury caused by it, unless he has information or reason to believe that a safer kind of machinery for the same work is in common use elsewhere: *Nis v. Texas Pac. R'y Co.*, 82 Tex. 473; 27 Am. St. Rep. 897, and note; *Kehler v. Schwenk*, 144 Pa. St. 348; 27 Am. St. Rep. 633.

MASTER AND SERVANT — LIABILITY OF MASTER TO INEXPERIENCED SERVANT FOR DANGER NOT APPRECIATED BY HIM. — A minor servant can recover from the master for injuries suffered by him from any peril which he did not know, or could not properly appreciate if he did know: *Hinckley v. Horandovsky*, 133 Ill. 359; 23 Am. St. Rep. 618, and note; *Chirack v. Merchants' Woolen Co.*, 151 Mass. 152; 21 Am. St. Rep. 433, and note; *Runnel v. Dikeorth*, 131 Pa. St. 509; 17 Am. St. Rep. 827, and note; *Colorado etc. R'y v. O'Brien*, 16 Col. 219.

MASTER AND SERVANT — MASTER'S DUTY TO PROTECT SERVANT FROM UNUSUAL RISK. — When the dangerous condition of machinery is foreseen
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by the owner, it is his duty to adopt every possible precaution to save those working about it from injury, and a failure to do so will make him liable for all resulting injury: *Mastis v. Levagood*, 47 Kan. 36; 27 Am. St. Rep. 277, and note; note to *Shortel v. St. Joseph*, 24 Am. St. Rep. 322. But knowledge by a servant that a master's machinery is habitually used in a particularly dangerous and unlawful way, if he thereafter remained in his employment, is evidence of contributory negligence against him: *Abbot v. McCadden*, 81 Wis. 563; 29 Am. St. Rep. 910, and note. See *Gustafsen v. Washburn etc. Mfg. Co.*, 153 Mass. 468.

MASTER AND SERVANT—SERVANT'S RIGHT TO PRESUME THAT MASTER HAS FURNISHED SAFE APPLIANCES.—A servant has a right to assume, without inquiry or examination, that the appliances furnished him are safe and suitable: *Carter v. Oliver Oil Co.*, 34 S. C. 211; 27 Am. St. Rep. 815, and note; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180; *Myhan v. Louisiana Electric Light etc. Co.*, 41 La. Ann. 964; 17 Am. St. Rep. 436. See note to *Shortel v. St. Joseph*, 24 Am. St. Rep. 320.

MASTER AND SERVANT.—A MASTER IS BOUND TO INSTRUCT A YOUNG OR INEXPERIENCED SERVANT with reference to dangerous machinery, so that he can understand and appreciate the danger connected with it and the necessity for the exercise of care: *Ingerman v. Moore*, 90 Cal. 410; 25 Am. St. Rep. 133, and note with cases collected; *Myhan v. Louisiana Electrical Light etc. Co.*, 41 La. Ann. 964; 17 Am. St. Rep. 436, and note.

WELSH v. LONDON ASSURANCE CORPORATION.

[1st PENNSYLVANIA STATE, 67.]

INSURANCE—NOTICE OF LOSS.—Proof that the adjuster of an insurance company was sent to the place of the fire under instructions from his company, and that he was there one week after the fire, is conclusive evidence of notice to the company of the loss.

INSURANCE—PROOF OF LOSS—WAIVER—ESTOPPEL.—When the insured, in good faith and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy as to proofs of loss, good faith equally requires that the company shall notify him promptly of any objections thereto, so as to give him an opportunity to obviate them, and mere silence may so mislead him, to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel.

INSURANCE—VARIANCE BETWEEN APPLICATION AND POLICY—PRESUMPTION.—When a life tenant states his interest to be "a life lease," in his application for fire insurance, and the insurance agent issues a policy on the full value of the fee, the company cannot, after loss, set up the mistake of its agent as a defense. The presumption exists that the policy represents the precise and definite contract between the parties, and the burden of proof is upon the one who seeks to change its terms by parol.

INSURANCE BY LIFE TENANT—MEASURE OF DAMAGES.—When a tenant for life, intending to insure the property for the benefit of himself and the remaindermen, receives a policy for the full value of the fee, by mistake of the insurer, who accepts the full premium, the insured may recover the full value of the policy after loss, as trustee for the remaindermen.

ACTION to recover for the loss of a dwelling-house insured by a tenant for life. Judgment for plaintiff. Defendant appealed.

J. H. Osmer, for the appellant.

John O. McCalmont and Bryant H. Osborne, for the appellee.

MITCHELL, J. Eight of the eighteen assignments of error relate to the notice of the fire and the proofs of loss. As to the notice, Cluff testified that Ray, the adjuster, was sent to the place under instructions from himself or the company, and it is undisputed that Ray was there a week after the fire. This was conclusive evidence of notice to the company.

As to the proofs of loss, although they are conceded to be informal, they come plainly within the rule laid down in *Gould v. Dwelling-house Ins. Co.*, 134 Pa. St. 570, 588; 19 Am. St. Rep. 717; and the circumstances under which they were delivered put upon defendants the duty of notifying the plaintiff of their objections, if the want of form was to be relied upon. The failure to give such notice was evidence for the jury of a waiver. But it is said that the proofs of loss were not sent to the company, as required by the policy, but left at the office of the local agent, Barbour; and *Trask v. State etc. Ins. Co.*, 29 Pa. St. 198, 72 Am. Dec. 622, and *Edwards v. Lycoming etc. Ins. Co.*, 75 Pa. St. 378, are relied upon to show that such delivery is not sufficient. In both these cases the policy required the notice to be given "forthwith," and to the company, and it was held that unexcused delays of eleven and eighteen days, respectively, were unreasonable, and should be so pronounced as matter of law. And in *Edwards v. Lycoming etc. Ins. Co.*, 75 Pa. St. 378, it was said that the local agent had no authority to receive the notice, and was not bound to communicate it to the company. But since these decisions, the act of June 27, 1883 (P. L., p. 165, sec. 1), has practically given a legislative definition of reasonable time by fixing the period of ten days for notice of the fire and twenty for the proofs of loss, and has settled the question of the agent's authority by enacting that the notice and proofs may be delivered to the company at its general office, or to the agent who countersigned the policy. There was evidence to justify submitting these matters to the jury in the way it was done, and the assignments of error relating thereto must be dismissed.

The substantial defense was upon the admitted fact that the

insurance was on the full value of the fee in the land, while the plaintiff's interest was only a life estate. Unexplained, this was a solid defense on the merits, and the burden of explanation was on the plaintiff. It was testified by Neeley that he wrote the application for insurance for the plaintiff at her request, and that her interest in the house was correctly stated therein as "a life lease." This application was sent or given by Neeley to Barbour, who, by his own testimony, had authority to write up the policy by inserting the description of the insured interest in the land, and did so in this case. The application was not produced by defendant, nor was Neeley's testimony as to its contents in any way contradicted. Upon the evidence, therefore, it was plain that the defendant had issued the policy with knowledge of the actual condition of the title, and the mistake in the description was that of its own agent, which it could not set up as a defense: *Burson v. Fire Association*, 136 Pa. St. 267; 20 Am. St. Rep. 919; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331; *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; 98 Am. Dec. 332; *Meadowcraft v. Standard F. Ins. Co.*, 61 Pa. St. 91; *Eilenberger v. Protective M. F. Ins. Co.*, 89 Pa. St. 464. The learned judge below declined to affirm the defendant's points, and to say as matter of law that the policy was void, but submitted the case to the jury with full and explicit instructions as to the presumption in favor of the policy being the precise and definite contract, and the burden of proof resting on the plaintiff. Under the evidence, this was the only proper disposition to make of it.

The question of the measure of damages is not free from difficulty, owing to the meagerness of its presentation by both parties. Undoubtedly, the general rule that the insured cannot recover more than his actual loss, or the value of his interest, would, without more, limit the recovery of a life tenant, as of a lessee, to the value of his unexpired term: See Wood on Fire Insurance, 481. But it is equally true that a carrier, or custodian, or agent may insure in his own name, and recover the entire loss, standing as a trustee for all the amount recovered in excess of his interest: Wood on Fire Insurance, 617, 632, 1121, and cases cited. In *Miltenberger v. Beacom*, 9 Pa. St. 198, it was said: "The contract of assurance, like other contracts, may be effected by the agency of a third person, without the authority of the person to be benefited, if he subsequently recognize it. It is true, that to enable the bene-

ficiary to sue upon it directly, he must be expressly named." In the present case, Neeley testified that there was some talk with plaintiff as to the name in which the insurance should be taken, she saying that some one thought it had better be in the name of the executor or administrator, but she thought, as she had control of it, it had better be in her name. This, in connection with the fact that the full premium was paid and the policy issued for the full value of the fee, may fairly be taken to indicate the real intent of the parties to insure the whole for the benefit not only of the plaintiff as life tenant, but also of the remaindermen. The company is in no position to contest this intent, for with notice in the application that the plaintiff was only life tenant, it charged the full premium and issued the policy on the fee. It is in no danger of a second action by the remaindermen, for they are not named in the policy; and on the authority of *Miltenberger v. Beacom*, 9 Pa. St. 198, they cannot sue directly, and a suit through plaintiff would be barred by the present judgment. On the other hand, the plaintiff, by suing for and recovering on this evidence the full value of the fee, has put herself in the position of trustee for the remaindermen as to the excess of the judgment over the value of her life interest. As the evidence on this branch of the case was entirely uncontradicted, the jury would not have been justified in taking any other view of it, and therefore the instructions on the measure of damages, though not so explicit as might be necessary in a contested case, cannot be held erroneous.

There remain to be considered only the seventh and eighth assignments, in regard to the denial of liability for specified reasons, as a waiver of other defenses. The only ground upon which such a result can rest is estoppel. No party is required to name all his reasons at once, or any reason at all, and the assignment of one reason for refusal to pay cannot be a waiver of any other existing reason, unless the other is one which could have been remedied or obviated, and the adversary was so far misled or lulled into security by the silence as to such reason that to enforce it now would be unfair or unjust: *National Ins. Co. v. Brown*, 128 Pa. St. 386. The whole doctrine depends on estoppel, and the essential feature of it is loss or injury to the other party by the act of the party to be estopped. In this respect there is nothing peculiar about actions upon insurance policies. They stand on the same

footing as other litigation. But it has been held that preliminary proofs of loss, though essential, are in their nature formal, and "a condition precedent, not to the undertaking of the insurer, but to the right of action of the insured": Strong J., in *Inland Ins. etc. Co. v. Stauffer*, 33 Pa. St. 397. Substantial compliance with the requirements of the policy is therefore all that is necessary, and the jury may infer a waiver from the acts of the parties. The rule on this subject was carefully formulated in *Gould v. Dwelling-house Ins. Co.*, 134 Pa. St. 570, 588, 19 Am. St. Rep. 717, as follows: "If the insured, in good faith, and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy, good faith equally requires that the company shall promptly notify him of their objections, so as to give him the opportunity to obviate them; and mere silence may so mislead him, to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel." The circumstances under which plaintiff herself took the list and estimate to Barbour were, as already said, sufficient, under the above rule, to take the case to the jury on the question of waiver, and therefore the instruction complained of in the seventh assignment was proper. The plaintiff's fifth point, however, that if the authorized agents of the defendants refused payment of the loss, giving a specified reason therefor to the plaintiff, they must be confined to that reason upon the trial, and the jury should disregard any other defense now made by them, was entirely too broad, and its affirmance, as a general proposition of law, would be clear error. It ignores the elements of estoppel, and lays down a rule without reference to conditions essential to its existence and applicability.

The cases cited by appellee do not sustain the proposition in its breadth as put. In *Pennsylvania Fire Ins. Co. v. Dougherty*, 102 Pa. St. 568, *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. St. 149, and *Insurance Co. v. Ensminger*, 12 Week. Not. Cas. 9, there was a positive refusal to pay at all, on grounds that the proofs of loss would not have cured, and it was held that the latter were therefore waived; and in *Western etc. Pipe Lines v. Home Ins. Co.*, 145 Pa. St. 346, 27 Am. St. Rep. 703, a like positive refusal to pay was held evidence of a waiver of the period of sixty days allowed by the policy for adjustment and payment of the loss. All of these cases rest upon the sub-

stantial element of estoppel, that the defendant, having led the plaintiff to suppose that a compliance with the preliminary formalities would be unavailing, could not thereafter set up the want of such preliminaries. Of the soundness of that principle there can be no question.

But it is not fair to the learned court, or to the case, to take his language apart from the special facts under consideration, and an examination of the record and the assignments of error fails to disclose any defense which the appellant undertook to make, that was improperly shut out by this instruction. While, therefore, its language was too general, and would not bear application to other circumstances, yet it could not have misled the jury in the present case, and therefore did the appellant no harm.

Judgment affirmed.

INSURANCE—NOTICE OF LOSS.—The notice to an insurance company is sufficient, when such notice induces the company to send its agents to the place to investigate the loss: *Insurance Co. v. McDowell*, 50 Ill. 120; 99 Am. Dec. 497. When an insurance company, after delayed notice of loss, sends two agents at different times to ascertain the loss, with offers to compromise and settle it, these acts waive the objection that notice was not sent "forthwith": *Lycoming Ins. Co. v. Schreffler*, 42 Pa. St. 188; 82 Am. Dec. 501, and note.

INSURANCE—NOTICE OF OBJECTIONS TO PROOFS OF LOSS—DUTY OF INSURER TO GIVE.—If an insurer in good faith does in the stipulated time what he intends as a compliance with the terms of his policy as to proofs of loss, the insurer must promptly notify him of its objections thereto, so as to give him an opportunity to obviate them; and mere silence may so mislead him, to his disadvantage, as to be of itself sufficient evidence of waiver by estoppel: *Gould v. Dwelling-house Ins. Co.*, 134 Pa. St. 570; 19 Am. St. Rep. 717, and note; *Commercial etc. Assur. Co. v. Hocking*, 115 Pa. St. 407; 2 Am. St. Rep. 562, and note with cases collected; *Jones v. Mechanics' etc. Ins. Co.*, 36 N. J. Eq. 29; 13 Am. Rep. 405. An insurance company waives objections to proofs of loss by retaining them without pointing out specific objections to them: *Insurance Co. v. McDowell*, 50 Ill. 120; 99 Am. Dec. 497; *Herron v. Peoria etc. Ins. Co.*, 28 Ill. 235; 81 Am. Dec. 272, and note; *Weed v. Hamburg etc. Ins. Co.*, 133 N. Y. 394; *Davis Shoe Co. v. Kittanning Ins. Co.*, 133 Pa. St. 73; 21 Am. St. Rep. 904, and note.

INSURANCE BY TENANT—RECOVERY OF DAMAGES.—When a policy of insurance on the tools and buildings of the insured, who had only a leasehold interest in the buildings and the land on which they stand, is issued without any representation by the assured as to his interest, and he has paid the entire premium, it is valid, notwithstanding a clause therein which provides that the policy shall be void if the assured be not the sole and unconditional owner of the property insured, or if his interest is not truly stated in the policy. It will be presumed that the policy was written upon the knowledge of the insurer, through his agent, and was intended in good faith to cover

the insured interest in the property: *Philadelphia Tool Co. v. British American Assur. Co.*, 182 Pa. St. 236; 19 Am. St. Rep. 596, and note. Though a policy of insurance specifies that it shall be void if the property insured is upon leased ground, unless the same is especially agreed to in the policy, the company cannot avoid the policy for a breach of that condition, if its agent was aware that the property was on leased ground, and made out the policy himself: *Germania etc. Ins. Co. v. Hick*, 125 Ill. 351; 8 Am. St. Rep. 384, and note.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

GABRIELSON v. WAYDELL.

[125 NEW YORK, 1.]

OWNER OF VESSEL NOT LIABLE FOR WILLFUL ASSAULT OF CAPTAIN UPON SEAMAN. — The owners of a vessel are not liable in damages for the willful and malicious act of their captain in assaulting and injuring a seaman while upon the high seas. Such an act is of a criminal nature, and cannot, therefore, be intended by the law to be within the scope of the employment of the captain, nor within the authority committed to him.

MASTER AND SERVANT — CAPTAIN OF VESSEL AND SEAMEN FELLOW-SERVANTS. — The captain of a vessel and the seamen are fellow-servants working together in the same undertaking and in a common service; and if, under the guise of exercising the authority conferred upon him, he willfully and maliciously does an injury to a seaman, the owners of the vessel will not be liable therefor. The captain's misconduct in such a case is one of the risks which the seaman assumes, in the absence of proof that the owners failed to select a proper and competent captain.

ACTION to recover damages from the owners and captain of a vessel, upon which the plaintiff had shipped as an able seaman, for injuries received by him while in such service. During a voyage from the West Indies to the United States, the captain of the vessel came into the fore-castle, where the plaintiff was, on a certain occasion, and ordered him to go on deck. Plaintiff told him he was sick. The captain then struck him several times while lying in his bunk, pulled him out of his bunk, and said, "Will you go on deck now?" Plaintiff replied, "I feel sick; I am not able to go on deck." The captain then struck him again several times with his fist, and upon plaintiff's catching hold of his arm, kicked him upon the leg, breaking the bone below the knee. There was no provoca-

tion for the captain's conduct beyond the plaintiff's complaint of illness. When the vessel arrived at New York, the plaintiff was taken to the hospital, where he remained until discharged as cured. The captain was not served with the summons and complaint, as he had never returned from a subsequent voyage, and was supposed to have been lost. The plaintiff recovered, and the defendants appealed. Other facts appear from the opinion.

N. B. Hoxie, for the appellant.

George P. Gordel, for the respondent.

GRAY, J. The question brought up by this record is, whether the owners of a vessel can be made liable in damages for the willful and malicious act of their captain in assaulting and injuring a seaman while upon the high seas. The learned trial judge, in denying the motion to dismiss the complaint, proceeded upon two grounds, namely, that the captain was the representative, or *alter ego*, of the owner, and was not a fellow-servant with the plaintiff; and that the willful and malicious nature of the captain's act constituted no ground for an exception to the liability of the owners, if the act was performed within the general scope or course of his employment. Therefore, he left it to the jury to decide whether, in what he did to the plaintiff, the captain was acting in the line of his duty.

I think this appeal should prevail. There was no conflict in the evidence, and it proved a willful assault by the captain of the vessel upon one of the seamen, which nothing in the evidence, or within any principle of the maritime law, justified as coming within a proper, or an intended, exercise of authority. For its occurrence the owners cannot be held responsible, in my opinion, either upon sound reasoning, or upon any sufficient precedent; and the trial judge should have dismissed the complaint. I concede fully that we should, in determining this question, be guided by the principles of the maritime law. The plaintiff's employment was, of course, a maritime contract. It is matter of familiar knowledge that about the mariner the maritime law throws a protection greater than is extended by the general rules of the common law to him who is employed in a service upon the land. This distinction arises, very naturally, from the difference in the nature of a mariner's life and employment, which subject him to hazards and hardships, and tend to make him heed-

less in character. So the maritime law is peculiarly solicitous of his rights, and watches over his more unprotected condition. Thus, for instance, it is strict in requiring shipping articles, and liberal in interpreting them for the seaman's interests, in the presence of unfair or inadequate provisions. It obliges the owners to provide a seaworthy vessel; it requires that the vessel shall be provided with proper appliances for the seaman's safety, and with adequate and proper food for his sustenance, and it imposes the duty of providing for his medical care and attendance in case of sickness or wounds. From the seaman a faithful and strict performance of his duties is required, and because of the responsibility devolving upon the master of the vessel for the successful conduct of the voyage, considerable latitude in disciplinary powers is allowed him, though no cruel or excessive punishment is sanctioned. In rendering to the seaman that care and in performing those duties toward him which the law exacts from the owners of the vessel, the captain, for such purposes, represents them, and a neglect of his, in such respects, is visited upon the owners. This liability follows from the situation of the parties. The owners are not in charge of the vessel. They remain upon the land and employ a master for the vessel, as well to carry out their assumed or implied obligations to the members of the ship's company, as to perform the undertaking of conducting the craft successfully upon its voyage. The delegation of powers to the master of the vessel comprehends their exercise in all such ways as the safety of the vessel and the welfare of its company render needful or expedient. While in those respects which demand of the owners the rendition of certain duties towards the crew, the master of the vessel must and does represent them, and by his failure or neglect will entail consequences upon them for the breach of the obligation, he is, notwithstanding his representative and superior position, but a servant, employed with the others of the ship's company upon the vessel in the service of its owners. The scope of the service varies, as the position of the individuals employed differs; but relatively to the general undertaking, they are fellow-servants, engaged in one common employment.

In *Scarff v. Metcalf*, 107 N. Y. 211, 1 Am. St. Rep. 807, which was an action by a mate against the owners of a vessel to recover damages for negligence in omitting to provide him with adequate medical attendance and care, the plaintiff's recovery was sustained in this court upon the ground that

there had been a neglect of a duty imposed by the maritime law. Such a duty has always been recognized, and was prescribed in the laws of Oleron and Wisbuy. What that cause decided with respect to the liability of the owners of a vessel to a seaman for a neglect of the captain was, that it existed whenever his neglect concerned something as to which a duty rested upon the owners under the principles of the maritime law, which, by force of the situation, could only be discharged through the agency of the vessel's master. Its effect is to hold that in matters relating to the owners' duty to the seaman which the captain must perform, his neglect could not be regarded as merely that of a fellow-servant, but as the neglect of the owners.

Cases which relate to the rights of passengers or third persons I do not consider as precedents, and several of that nature have been referred to. In the one class of cases the passenger's contract for transportation entitles him to protection against the negligence or assaults of the employees of the carrier. In the other class, strangers have the right to hold the owners liable for the consequences of a willful act of the captain, performed while engaged in the prosecution or execution of the owners' business. The cases of *Hunt v. Colburn*, 1 Sprague, 215, and *Luscomb v. Osgood*, 1 Sprague, 82, related, as to the first, to the wrongful dismissal of an officer, and as to the second, to the right to compensation for a minor's services; and I cannot see in them precedents for the decision of this case. Nor is the case of *Sherwood v. Hall*, 3 Sum. 127, an authority. That was an action for the shipment, by the master of a vessel, of the minor son of the libellant, and he recovered a certain amount of wages, and something for expenses and losses. The master there was the agent of the owners in shipping seamen to be employed on their vessel.

The responsibility for the wrong-doings of the master of a vessel rests, to a certain extent only, upon the owners, and that extent is reached when the performance of the act complained of cannot be seen properly to come within some principle of the law of agency. The agency of the captain for the owners would include all those acts which are fairly embraced within the scope of his appointment, and which would be in the line of his duty; but when he injures his men by misconduct or assault, that would seem to be as much one of the risks which they assumed in entering the employment upon the vessel, as it would be one in the case of an employ-

ment in a concern upon the land where the control and superintendence had been committed by the proprietor to a manager. It is impossible to regard a wanton assault upon a seaman, by his captain, as something within any intended authority, or within the scope of his employment. He outruns his authority and commits an act which the owners will not be presumed to have assented to. I believe that by no extension of the principles of the law of master and servant, the general source of the law of principal and agent, could the blame be imputed to the owners of the vessel. It should at least appear that the act of the captain was required by the pressing emergencies of the occasion, and not that he had indulged his passions by a vindictive treatment of the seaman.

In the cases of *Dias v. Privateer Revenge*, 3 Wash. C. C. 262, and of *Ralston v. State Rights*, Crabbe, 22, the distinction is recognized between the acts of a master of a vessel done while engaged in the course of his duty in the prosecution of the owners' business, and those wholly outside of the scope of his employment. In the one case, the illustration was of a piratical seizure, and in the other, it was of the commission of a crime by the captain; neither of which acts can be imputed to his owners, or be intended to come within the employment or authority committed to him. In *Wilson v. Rankin*, 6 Best & S. 208, which was an action to recover insurance moneys, the question turned upon whether the authority of the master of a vessel was of such a general nature as to subject the owners to the consequences of his having stowed the cargo in violation of the statute. Judgment was rendered for plaintiff, and Cockburn, C. J., in delivering the opinion of the court, used language quite applicable here. He said that "it is a well-established distinction that while a man is civilly responsible for the acts of his agent when acting within the established limits of his authority, he will not be criminally responsible for such acts, unless express authority be shown, or the authority is necessarily to be implied from the nature of the employment, as in the case of a bookseller held liable for the sale, by his shopman, of a libelous publication. Under ordinary circumstances, the authority of the agent is limited to that which is lawful. If, in seeking to carry out the purpose of his employment, he oversteps the law, he outruns his authority, and his principal will not be bound by what he does." And again, he said that "no authority can be implied in the master, in the discharge of

his duty, to do that which, with reference to this part of his duty, was a violation of the law."

What was the act here complained of, if not a willful and unjustifiable assault? It was not disciplinary; for the idea of discipline does not suggest a personal attack with blows and kicks; and incompetency or inability does not justify punishment: *Payne v. Allen*, 1 Sprague, 304. It was certainly within the category of those offenses for which the United States statutes have prescribed the punishment of fine or imprisonment: U. S. Rev. Stats., sec. 5347. It was of a criminal nature, and hence not intended by the law to be within the scope of the employment of the captain, nor within the authority committed to him.

Conceding all that we should to the force of the established principles of maritime law in determining the question of liability here, we cannot say that the general rule at common law is interfered with in its application to the case, or that those principles of the maritime law establish any different rule. There is no question but that the powers of a captain of a vessel are very extensive, by virtue of his peculiar position. His great responsibilities and the general interests of commerce invest him with much discretionary power. His is the agency to which the law looks for the fulfillment of the obligations resting upon the vessel's owners; and for his shortcomings and wrong-doings, when occurring in the performance of his duty or in the scope of his employment, those owners must be liable. The more extensive powers and wider control exercised by the captain enlarge the field of service, and necessarily heighten the responsibility of the owners to passengers, servants, or strangers; but, after all that can be said, where is the warrant for holding them liable for the consequences of acts which are in utter departure from the execution of a duty? He has absolute command over the seamen in matters pertaining to their duties; but his command does not extend over their persons, beyond the infliction of usual and necessary punishment in cases of disobedience or infraction of rules.

We are then brought to the consideration of the rule of liability which would be applied to this case under the law as settled by this court, and there we will find the rule is not *respondet superior*. We find that for an injury resulting to an employee from the willful neglect or tortious act of another who is engaged in a common employment with him,

the master is not liable at the suit of the injured employee. He has performed his duty when he has furnished to those who are employed by him a reasonably safe place, appliances adequate to the purposes of the employment, and when he has appointed, as fellow-servants in the undertaking, proper persons, competent for their positions. After that, for what may happen from the risks of the employment, or from the negligence and torts of fellow-servants, he will not be responsible. In the early case in this court of *Keegan v. Western R. R. Co.*, 8 N. Y. 175, 59 Am. Dec. 476, Ruggles, C. J., stated the general rule thus: "Whenever the injury results from the actual negligence or misfeasance of the principal, he is liable as well in the case of one of his servants as in any other. But where the injury results from the actual fault of a competent and careful agent (as may sometimes happen), the fault will not be imputed to the principal when the injury falls upon another servant as it will where the injury falls on a third person, as, for instance, on a passenger on a railroad. In the case of a passenger, the actual fault of the agent is imputed to the principal, on grounds of public policy; in the case of a servant, it is not."

There is no evidence in this case that the owners failed in a compliance with any obligation to their employees in the ship's company in the selection of a proper and competent captain; and were they to be accountable for his loss of temper or misconduct toward the other employees? I think not.

The proposition that the master of a vessel is not a fellow-servant of the seaman is predicated upon the difference in their grades, and it has received the support of a decision in the United States supreme court, in the case of *Chicago etc. Ry Co. v. Ross*, 112 U. S. 377, upon which case subsequent decisions in the federal courts have been based, which are referred to in the respondent's brief. The opinions in the cases of *The Titan*, 23 Fed. Rep. 413, *The Sachem*, 42 Fed. Rep. 66, and of *The A. Heaton*, 43 Fed. Rep. 593, which are referred to by the respondent, were expressly rested upon the *Ross* case.

Spencer v. Kelley, 32 Fed. Rep. 838, which seems to give some support to the respondent's contention, was at *nisi prius*. The trial judge's remarks in his charge, if susceptible of the meaning attached to them, have no support, unless in the *Ross* case. He certainly refers to no authority. The *Ross*

case was decided by a mere majority of the justices, and is of questionable authority. It is without weight in this state, and has been distinctly disapproved in *Loughlin v. State*, 105 N. Y. 159. Judge Andrews, speaking there of the responsibility of employers for injuries sustained by servants from the negligence of co-servants, remarked: "In harmony with the general principle that the character of the act is the decisive test, it has been repeatedly decided in this court that the fact that the person whose negligence caused the injury was a servant of a higher grade than the servant injured, or that the latter was subject to the direction or control of the former, and was engaged at the time in executing the orders of the former, does not take the case out of the operation of the general rule, nor make the master liable."

The learned judge, referring to the citation of the *Ross* case, said it was "in conflict with the course of decisions in this state and elsewhere." That case and many prior decisions of this court, to some of which Judge Andrews refers, have settled the rule that the liability of the master for a servant's injury, received while in his employment from the act of another servant, does not depend upon the grade or rank of the offending or negligent servant. The liability of the master to his servant in such cases does not depend upon the doctrine of *respondeat superior*. That doctrine has no application, and if a servant, under guise of exercising the authority conferred upon him, willfully and maliciously does an injury to another servant, the servant's master is not liable. As to such a matter the relation of master and servant affords no ground for an action: *Sherman v. Rochester etc. R. R. Co.*, 17 N. Y. 153; *Hofnagle v. New York Cent. etc. R. R. Co.*, 55 N. Y. 610; *Malons v. Hathaway*, 64 N. Y. 5; 21 Am. Rep. 578; *Crispin v. Babbitt*, 81 N. Y. 516; 37 Am. Rep. 521; *Loughlin v. State*, 105 N. Y. 159.

In every case it is the character of the act which causes the injury to a fellow-servant that determines the question of the master's liability, and the dividing-line may be found in the willfulness or in the neglect which caused it.

It was said in *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507, that the master is not accountable for every mischievous act of the servant which he is enabled to commit in consequence of the general relation; and Lord Kenyon remarked in *McManus v. Crickett*, 1 East, 106: "When a servant quits sight of the object for which he is employed, and without hav-

ing in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him."

The law may be regarded as settled in the English courts, for a number of years, that the master is not liable to a servant for an injury occasioned by the negligence of a fellow-servant, although he be a vice-principal or the manager of the concern: *Priestley v. Fowler*, 3 Mees. & W. 1; *Wilson v. Merry*, L. R. 1 H. L. S. 326; *Howells v. Lansdore Steel Co.*, L. R. 10 Q. B. 62.

There is a very recent case quite in point decided by the English court of appeal. In *Hedley v. Pinkney etc. S. S. Co.*, L. R. 1 Q. B. (Jan. 1892) 58, that court decided, reversing a judgment recovered below, that ship-owners were not liable in damages for the death of one of the crew of a steamship, occurring by reason of the captain's negligence, in a matter pertaining to the care of the ship. It was there held that the captain and men were fellow-servants, engaged in a common employment, and for the injury resulting to the one from the negligence of the other their master was not liable. Reference was made in the opinions to the case of *Ramsay v. Quinn, Jr.* R. 8 Com. P. 322, where a contrary view was taken by the Irish court of common pleas as to the liability of the ship-owners, and as to the relations of the captain and seamen, and the court of appeal refused to accept or to agree with that decision as authority. Kay, L. J., in his opinion in the case, said, in referring to *Wilson v. Merry*, L. R. 1 H. L. S. 326, which was a case where a miner was killed, through an explosion caused by the negligence of a manager of the mine: "I see no difference between that case and the case of a captain of a ship and one of the crew."

I think there is no reason for applying any different rule of law in this case than that recognized in our own and in the English courts. However great may be the powers of a captain of a vessel, and however absolute his control, these considerations do not furnish a reason for holding his owners responsible for his malicious conduct towards the other seamen. They are all working together in the same undertaking, and are in a common service, and his misconduct is one of the risks the seaman assumes. I am not satisfied that there is any principle of the law which intends, or that any consideration of public policy demands, that the owners shall come under any obligation to indemnify a member of the

ship's company against such negligent or tortious acts of the captain.

I deem it, too, somewhat significant that no case is referred to in the admiralty or United States circuit court reports prior to the decision in the Ross case where the owners of a vessel have been sued for the captain's tortious acts, and my own examination has revealed none; though I find many cases where the captain has been sued for damages. For instance, in *Thomas v. Lane*, 2 Sum. 1, decided in 1834, the captain was sued, and held as jointly liable with a mate for the mate's tort. In *Forbes v. Parsons*, Crabbe, 283, decided in 1839, in *Fuller v. Colby*, 3 Wood. & M. 1, decided in 1846, in *Jordan v. Williams*, 1 Curt. 69, decided in 1851, and in *Payne v. Allen*, 1 Sprague, 304, decided in 1855, the libels were against the captain for personal wrongs from his acts of violence and ill-usage. I am quite unable to perceive any reason for holding the owners of this vessel responsible for the mere passionate and vindictive act of their captain. The complaint should have been dismissed by the trial judge on the motion of their counsel.

The judgment and order appealed from should be reversed, and a new trial ordered, with costs to abide the event.

MAYNARD, J., delivered a dissenting opinion, of which the following is a synopsis: Under the maritime law, the master of the ship has plenary powers as the agent and representative of the owners. He determines all matters relating to the discipline of the crew, and the kind of punishment to be inflicted for disobedience of orders, or for a breach of maritime regulations, and when and by what instrumentality it shall be administered. On shipboard his word is law, and he is master of the vessel, in fact as well as in name. But while the master is thus clothed with extraordinary powers, he is bound to the owners, and he and they to every one who may be affected by his acts, for his skill and attention in the management of the ship. It is not sufficient that he exercises his best judgment, but he is bound to show that he possessed and exercised the judgment of a good commander, with reasonable skill, care, prudence, and fidelity: Curtis on Merchant Seamen, 195. By the general maritime law of continental Europe, the responsibility of the owners for the master's obligations *ex delicto* might be limited to their interest in the vessel and freight, if they so elected, but neither the civil law nor the common law of England recognized any such limitation, but hold the owners personally liable for all the obligations which the master incurs within the scope of his authority as master, whether they arise *ex contractu* or *ex delicto*: Curtis on Merchant Seamen, 198, 199; Parsons on Maritime Law, 24, 391.

In *Dean v. Angus*, Bee, 375, the admiralty court held that the owners were liable for torts committed by the captains they employed, under a general principle of the maritime law, and not by virtue of any special contract. No different rule should be adopted in ascertaining and measuring

the liability of the owners for the tortious acts of the master towards the members of the crew from that which has been applied by this court where the servant has sought to render his employer responsible for injuries received in other than maritime employments. The ship-master and the crew were all engaged in a common undertaking, and unless the acts of which the plaintiff complains were in some form a violation of the obligations which the defendants assumed as a part of the contract of hiring, or of some positive duty imposed upon them by law, he cannot maintain this action: *Crispin v. Babbitt*, 81 N. Y. 516; 37 Am. Rep. 521; *Loughlin v. State*, 105 N. Y. 159. Wood, in his treatise on master and servant (sec. 438), notes this exception to the rule above stated: if the master places a servant in a position of authority over other servants, and makes the inferior servants subject to the direction and control of the superior, while he is not chargeable for the consequences of directions given by such superior servant within the scope of the general employment, yet he is chargeable to a co-servant for an abuse of such authority, as much as he would be to a stranger. The *gravamen* of the plaintiff's cause of action is, that he was cruelly and unnecessarily beaten by the captain for an excusable refusal to obey his orders, and it may well be questioned whether the case is not brought within the exception here referred to.

But the liability of the defendants in this case rests upon a much broader ground. The plaintiff's injuries were the direct result of their failure to observe their contract obligations and duties towards him. The mariner's contract of hire is *sui generis*. He cannot withdraw from it at pleasure. If, without good cause, he leaves the service, he may be branded as a deserter and a criminal, and may be arrested by his employers without process or warrant, and forcibly compelled to return to the vessel and complete his engagement for service. If, in the judgment of his employers, he is remiss in his duty, or disobedient to his superiors, or guilty of any conduct subversive of the good order or discipline of the ship, he may be put in irons, confined in jail, or instantly subjected to corporal punishment. It is the only form of service known to the common law in which the employer by his own act can directly inflict a punishment on the employed for neglect of duty or breach of obligation: *Curtis on Merchant Seamen*, 12. These harsh and oppressive features of the service led to the imposition of correlative duties and obligations upon the ship-owners. Some of the most important stipulations in the seaman's contract for hire are, therefore, not usually contained in the shipping articles at all, but are dependent upon the principles of the maritime law. They are, however, none the less obligatory upon the parties. It is of supreme importance to the mariner, owing to his defenseless and perilous position on the high seas, that he shall be guaranteed good treatment and protection from unnecessary violence. These are guaranteed by the law, whether expressed in the written contract or not: 1 *Parsons on Maritime Law*, 476; *Abbott on Shipping*, 174; *Curtis on Merchant Seamen*, 19, 26, 28; 1 *Kay on Shipmasters and Seamen*, 574, 575.

The sixteenth admiralty rule of the supreme court of the United States provides that in all suits for assault and battery or beating, the suit must be *in personam* only. But in *Benedict on Admiralty Practice*, section 309, it is said that while this is undoubtedly true where the action is technically for the assault and battery as a mere tort, yet if the action be brought on the contract as for not treating with proper kindness a passenger or seaman, an assault or beating being the *gravamen* of the breach, the suit may be *in*

run against the vessel. From the early case of *The Ruckers*, 4 C. Rob. 73, it may be inferred that the seaman's right to reimbursement for injuries from an assault by the captain on the high seas antedates, in point of judicial recognition, that of the passenger.

If, during a voyage, a seaman is compelled to leave the ship on account of ill-usage or cruel treatment by the master, or through his agency the contract is broken, he is not regarded as a deserter, and may recover his wages for the whole voyage: *Rice v. The Polly and Kitty*, 2 Pet. Adm. 420; *Ward v. Amca*, 9 Johns. 133; *Sherwood v. McIntosh*, 1 Ware, 109; *The Minerva*, 1 Hagg. Adm. 347; *Limlund v. Stephens*, 3 Esp. 269; *Edward v. Trevellick*, 4 El. & B. 59; *Steels v. Thacker*, 1 Ware, 91; *Mayee v. Ship Moss*, Gilp. 228; *Relf v. Ship Maria*, 1 Pet. Adm. 186; *The America*, Blatch. & H. 183. All these decisions proceed upon the ground that cruel treatment by the ship-master is a breach of the contract of hiring on the part of the owners, and relieves the seaman of all further obligation to perform on his part. The owners of a vessel are liable for such damages as will indemnify the seaman for the injury he has sustained by reason of the wrongful acts of the master: *Croucher v. Oakman*, 3 Allen, 185; *Hunt v. Colburn*, 1 Sprague, 215. In *Harden v. Gordon*, 2 Mason, 541, it was held that an express agreement on the part of the seamen to pay for medical advice and medicines was void. It does not follow that for injuries received while subjected to a mode of discipline authorized by the maritime law the seaman can maintain an action against the owners. A master of a vessel, like a parent or a teacher, is necessarily the judge to determine when resort shall be had to corrective measures. The proper discipline of the vessel is indispensable to the successful prosecution of the voyage. For an error of judgment in determining when punishment shall be inflicted, or in the selection of the means of chastisement, so long as it is one approved by the maritime code, or in the application of the means thus chosen, no recovery can be had. But there is no such feature in this case. What the master did is conceded not to have been done in the exercise of any disciplinary authority, but was an unprovoked, unjustifiable, and brutal assault. While acting as the representative of the defendants, he deliberately violated the agreement which they had made with the plaintiff. This case is not distinguishable in principle from *Scarff v. Metcalf*, 107 N. Y. 211; 1 Am. St. Rep. 807.

The responsibility of the ship-owners does not end when they have manned the vessel with competent and skillful officers and crew, and supplied it with all the provisions and equipments required by the maritime law. If a master, having on board an abundant supply of proper food, without good cause refuses to allow a sailor to partake of it, until starvation, exhaustion, or other bodily injury results, the owners will not be discharged from liability. If the master, having a suitable medicine-chest on board, unreasonably denies to a sick seaman the administration of the proper remedies, the owners will be liable for the resulting injury. If a master compels a disabled sailor to do duty continuously, without rest or sleep, until overcome, and perhaps permanently injured, by fatigue, his act will be deemed to be that of the owners, as much so as if they had been personally present and directed it. If, through the act of the master, the sailor has been deprived of the benefit of any of the ship-owners' obligations to him, the owners must bear the responsibility. In such cases the motive with which an obligation has been broken is not material. There are numerous cases holding that the ship-owners are not liable for the negligent acts of the master or other officers in the navigation of the ship, where such acts involve no breach of the contract

obligation or duties of the owners. *Benson v. Goodwin*, 147 Mass. 237, and *The City of Alexandria*, 17 Fed. Rep. 390, are typical of this class of cases. But these authorities have no relevancy or application to a case where, in consequence of the act, default, or negligence of the ship-master, the terms of the contract under which the seaman entered the service have been broken. The negligence of the ship-master in doing an act pertaining to the navigation of the ship, and his negligence in performing the stipulations in the contract of his principals, or a duty imposed upon them by law, differ widely in their legal effect. For the former, the mariner has no remedy against his employer. It was a risk which he impliedly assumed when he entered the service. But for the latter the ship-owners have bound themselves to be responsible. If they intrust the discharge of their obligations to another, they guarantee his fidelity, and his default becomes their default. An examination of *Thompson v. Hermann*, 47 Wis. 602, 32 Am. Rep. 784, and *Mathias v. Case*, 61 Wis. 491, 50 Am. Rep. 151, will show that these cases are in harmony, and that they support the conclusions above reached. These cases also illustrate very clearly the vital distinction that separates the cases where the owners must respond for the consequences of the negligent or wrongful conduct of the master from the cases where they are exempt from such liability. The ill-treatment of the plaintiff by the master was not successfully controverted on the trial. A serious and permanent physical injury has been the result. The verdict was not controlled by sympathy or prejudice, and the judge's charge contained no error prejudicial to the defendants. The judgment ought therefore to be affirmed, with costs.

LIABILITY OF SHIP-OWNERS FOR INJURIES RECEIVED BY SEAMEN FROM OFFICERS OF THE SHIP. — The term "seaman" has come to have a much more extended meaning in modern times than it had originally. In delivering the opinion of the court in *Holt v. Cummings*, 102 Pa. St. 212, 48 Am. Rep. 199, Clark, J., said: "Common sailors only were originally termed seamen, but the rights of seamen, under the rulings of American courts, from time to time, have been extended to the mate, surgeons, stewards, engineers, cooks, clerks, carpenters, firemen, deck-hands, porters, and chambermaids. All these classes of employees have been allowed to sue, in the admiralty, as mariners, or as persons rendering maritime services under a maritime contract." It seems to be quite impossible to reconcile the authorities on the main question under discussion. This fact becomes apparent from an examination of the prevailing and dissenting opinions in the principal case. The liability of the ship-owner for injuries inflicted upon the seamen by the master of the ship is very broadly stated in some of the authorities. Thus in the case of *Dean v. Angus*, Bee, 369, it was held that owners are answerable for the torts done by the masters they employ, under a general principle of the maritime law, and not by virtue of any special contract. And Parsons says: "The owner is responsible for the direct consequences of any wrong-doing of the master, which is done by him as master, in the discharge of his duty, and under the authority given him as master": 2 Parsons on Shipping and Admiralty, 29. See also 1 Parsons on Maritime Law, 394. Other authorities very much restrict these rules, holding that the rules applicable in determining the liabilities of ship-owners for the wrongful acts of the officers of the ship are the rules of the general law of agency, or of master and servant.

LIABILITY OF OWNER FOR FAILURE OF OFFICER TO PERFORM DUTY DUE FROM OWNER TO SEAMEN. — All the authorities agree that there are some duties to seamen which the maritime law imposes upon the ship-owner, and

that for the failure or neglect of the master of the ship to perform those duties the owner is liable. In the performance of those duties the master is regarded as the agent and representative of the owners, and if he neglects to perform them, his negligence is theirs. For an enumeration of the duties of ship-owners to seamen in their employ, see the note to *Scarff v. Metcalf*, 1 Am. St. Rep. 812-815. One of those duties is that of affording care and medical aid to sick and disabled seamen. When a seaman falls sick or suffers injury while engaged in the service of the ship, the owners owe the duty of rendering to him such care and medical aid as the circumstances will permit, and if the master of the ship fails to perform that duty, and the seaman suffers injury from the neglect, the owners are liable for the damages suffered: *Scarff v. Metcalf*, 107 N. Y. 211; 1 Am. St. Rep. 807; *Petersen v. Swan*, 50 N. Y. Sup. Ct. 46; *Holt v. Cummings*, 102 Pa. St. 212; 48 Am. Rep. 199; *Baxter v. Doe*, 142 Mass. 558; *Danvir v. Morse*, 139 Mass. 323; *Tomlinson v. Hewett*, 2 Saw. 278; *The Chandos*, 6 Saw. 544; *The City of Alexandria*, 17 Fed. Rep. 390; *The Vigilant*, 30 Fed. Rep. 288; *Baquinall v. The City of Carlisle*, 39 Fed. Rep. 807; *Olsen v. The Scotland*, 42 Fed. Rep. 925; *Couch v. Steel*, 3 El. & B. 402.

In the case of *Danvir v. Morse*, 139 Mass. 323, a seaman broke his leg while in the service of the ship. A few hours after the accident happened, the vessel was within an hour's sail of a port at which a surgeon could have been obtained. The captain refused to go there, but proceeded to his destination, which he reached two days after, when the injured leg, owing to unskillful treatment, was in a bad condition. The patient was compelled to remain in the hospital for a long time, and to submit to several operations, and nineteen months after the accident, the bones had not united. The owners were held to be liable for the injury resulting from the captain's negligence. In the case of *Olsen v. The Scotland*, 42 Fed. Rep. 925, on a voyage from Antwerp to New York, a sailor dislocated his shoulder about the time of the ship's departure from Antwerp, and requested the captain to put him ashore at Flushing or the Downs. The captain refused to do so, and on the vessel's arrival at New York, resection became necessary, to the permanent injury of the seaman. The owners were held liable in damages for the injury resulting from the captain's negligence. In *Baxter v. Doe*, 142 Mass. 558, the owners were held liable in damages for the sickness of a seaman, resulting from the neglect of the master to furnish proper food and anti-scorbutics; and it was held that the English statute requiring an owner liable for such sickness to pay three months' wages to the party injured does not limit the liability to that amount.

The hospital service of the United States is not intended to supersede the maritime law requiring a vessel to take care of a sick or injured seaman, but is simply auxiliary to it: *Holt v. Cummings*, 102 Pa. St. 212; 48 Am. Rep. 199; *The Chandos*, 6 Saw. 544. Such a provision is, in many cases, entirely inadequate, and it would be unjust to require the seaman to accept it in lieu of the provision made for him by the maritime law.

OWNER'S LIABILITY FOR WRONGFUL DISCHARGE OF SEAMAN BY MASTER.

—The owner of a vessel is responsible for the wrongful discharge, by the master, of a seaman before the expiration of his term of service, or for leaving him in a foreign port during the voyage for which he has shipped, and the measure of the damages of the seaman thus wrongfully discharged or left is an indemnity for all that he has lost and suffered: *Curtis on Merchant Seamen*, 197; *Hunt v. Colburn*, 1 Sprague, 215; *Orne v. Townsend*, 4 Mason, 541; *Atkyns v. Burrows*, 1 Pet. Adm. 245; *Croucher v. Oakman*, 3 Allen, 185.

LIABILITY OF OWNER FOR UNNECESSARY EXPOSURE OF SEAMAN TO DANGER.

— Ship-owners are bound to provide seamen with reasonable security against dangers to life and limb, and to supply them with reasonably safe appliances for the performance of their work on board ship; and if a seaman is injured through the failure of the officers of the ship to discharge this duty, the owners will be liable in damages for the injury: *Myers v. The Linzie Hopkins*, 1 Woods, 170; *Brown v. The D. S. Cage*, 1 Woods, 401; *The A. Heaton*, 43 Fed. Rep. 592; *Clowes v. The Frank and Willie*, 45 Fed. Rep. 494. But a seaman cannot recover for injuries resulting from his own carelessness in executing a proper order given by the master: *The Montauk*, 17 Fed. Rep. 96; *The Chandos*, 6 Saw. 544. A servant who is ordered by a master to perform on land a dangerous service may refuse to expose himself to the peril, and quit the service. But a seaman, when on the high seas, is bound to obey the master's commands or suffer punishment for his refusal. If, therefore, a seaman is ordered by the captain to do work which he knows to be dangerous, or to do work in a manner and by means which he regards as unnecessarily perilous, but nevertheless does it under protest, exercising due care to avoid injury, he will not be precluded from recovering from the owners for injuries received by him, because he did not then and there refuse to obey the master's orders, and undertake to withdraw from the service: *Thompson v. Hermann*, 47 Wis. 602; 32 Am. Rep. 784; *Clowes v. The Frank and Willie*, 45 Fed. Rep. 494.

LIABILITY OF OWNERS FOR UNREASONABLE CRUELTY AND SEVERITY OF

OFFICERS TO SEAMEN. — Ship-owners are bound by the maritime law to see that the seamen employed upon their ships have proper treatment, and that they shall be protected on the high seas from unnecessary violence or undue harshness and severity: 1 Parsons on Maritime Law; Curtis on Merchant Seamen, 28; Abbott on Shipping, 174; 1 Kay on Shipmasters and Seamen, 574. And while a seaman who leaves his ship without sufficient cause before the expiration of his term of service is treated as a deserter, and may be arrested as such and compelled to return and complete his engagements, yet a sailor who, to escape from great and unreasonable cruelty and severity of the officers of the ship, leaves her, is not guilty of desertion, and may recover his wages from the owners: *Limland v. Stephens*, 3 Esp. 269; *Edward v. Trevellick*, 4 El. & B. 59; *Rice v. The Polly and Kitty*, 2 Pet. Adm. 420; *Relf v. The Maria*, 1 Pet. Adm. 186; *Mages v. The Moss*, Gilp. 217; *Steele v. Thacher*, 1 Ware, 91; *The America*, Blatchf. & H. 185; *McKinnon v. The Reed Case*, 39 Fed. Rep. 629. The fact that a seaman is incompetent to perform the duties of the position for which he has shipped, or that he does not do his work satisfactorily, is no justification for the infliction of punishment upon him by the officers of the ship: *Payne v. Allen*, 1 Sprague, 304; *Riley v. Allen*, 23 Fed. Rep. 46.

LIABILITY OF SHIP-OWNERS FOR ACTS OF OFFICER WITHIN SCOPE OF HIS AUTHORITY. — It is a general principle of the law of master and servant that a master is liable for the wrongful act of the servant when the latter is at the time engaged in doing his master's business, and is acting within the general scope of his authority: Wood on Master and Servant, sec. 285; *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 129; 21 Am. Rep. 597; *Cohen v. Dry Dock etc. R. R. Co.*, 69 N. Y. 170; *Mott v. Consumers' Ice Co.*, 73 N. Y. 543. This rule is applicable as between the owners and officers of a vessel. The owners of a vessel are liable for injuries to the seamen caused by the negligence or unskillfulness of the master, provided the act be done within the scope of his authority as such: *Thompson v. Hermann*, 47 Wis. 602; 32 Am.

Rep. 784. And in the case of *The General Rucker*, 35 Fed. Rep. 152, where the mate of the vessel, while engaged with a seaman in unloading her, struck and injured him, his object in striking him being to enforce obedience to his orders or to drive him to more efficient work, it was held that the owner was liable for the injury, *in personam*, in admiralty. So in *Sherwood v. Hall*, 3 Sum. 127, a master who shipped a minor, who had run away from another vessel, under circumstances amounting to notice that the shipment was unauthorized by and against the will of the father, was held guilty of a tort for which the ship-owners were responsible. But to render a ship-owner liable for an assault by the captain upon a seaman, it must appear that in the infliction of the injury the captain was acting within the scope of his duty, and in the exercise of his control over the seaman. If the master of a ship assaults the seaman for an act of disobedience after the act has been done and the emergency has passed, he is not acting in the line of his duty, and the owner is not liable to the seaman for the injury thus inflicted upon him: *Spencer v. Kelley*, 32 Fed. Rep. 838. In *Dyer v. Riceley*, 28 La. Ann. 6, the mate of a steamboat, while standing on the boiler-deck at night, saw a roustabout on the deck, near barrels from which some whisky had been previously stolen, and threw a pine-knot, which struck the roustabout, putting out one of his eyes, and it was held that the owners were not liable for the injury, because the mate, at the time he committed the offense, was not acting within the scope of his employment. It was no part of his duty to act as watchman, another person being on the deck acting in that capacity at the time. And in the case of *The Hibernia*, 1 Sprague, 78, it was held that if the master of a ship wrongfully detains the clothing of a seaman, the owners are not liable therefor unless they have ratified the act of the master, or upon demand have refused to deliver it up.

LIABILITY OF OWNERS FOR ACTS OF FELLOW-SERVANTS. — The question, whether and when the officers of a ship are fellow-servants of the seamen is one upon which there is contrariety of judicial opinion. One line of authorities hold that the captain of a merchant ship is not a fellow-servant of the sailors, but is the agent or representative of the owners of the vessel during the voyage, who are responsible to the seamen for injuries resulting from his negligence: *Ramsay v. Quinn*, Ir. R. 8 Com. L. 322. The same rule is applied in a case where a sailor is injured by the negligence of a mate working with him in the unloading of the vessel: *Clowes v. The Frank and Willie*, 45 Fed. Rep. 494; *Daub v. Northern Pac. R'y Co.*, 18 Fed. Rep. 625. And it has been applied as between a pilot and a deck-hand: *The Titan*, 23 Fed. Rep. 413. In *Scarff v. Metcalf*, 107 N. Y. 211, 1 Am. St. Rep. 807, it was held that in respect to the owner's duty to the seamen, which the master performs in their behalf and as their representative, the master and the mate are not fellow-servants. Some of the American cases cited above no doubt followed the decision of the supreme court of the United States in *Chicago etc. R'y Co. v. Ross*, 112 U. S. 377. In that case, it was decided that the conductor on a railway train, having the right to command its movements and control the persons employed upon it, is not a fellow-servant of the engineer. Since the decision in that case, a disposition has arisen in some of the courts of this country, especially the federal courts, to apply its principle in the determination of questions relating to the liability of owners of vessels for the acts of the officers. The decision in the *Ross* case is, however, expressly disapproved in *Loughlin v. State*, 105 N. Y. 159. The case of *Ramsay v. Quinn*, Ir. R. 8 Com. L. 322, was also disapproved by the English court, in *Hedley v. Pinkney etc. S. S. Co.*, L. R. 1 Q. B. (1892) 58. The

established doctrine of the later English cases and of the late New York cases in this country seems to be, that the officers and the crew of a vessel are to be regarded as fellow-servants engaged in a common employment, and that it makes no difference that the latter are inferior to the former, and are bound to obey them; and that the owners are, therefore, not liable to the seamen for injuries received through the negligence or misconduct of the officers: *Wilson v. Merry*, L. R. 1 Sc. & Div. App. 326; *Howells v. Lansdowne Steel Co.*, L. R. 10 Q. B. 62; *Loughlin v. State*, 105 N. Y. 159; *Crispin v. Babbits*, 81 N. Y. 516; 37 Am. Rep. 521; *Hofnagle v. New York etc. R. R. Co.*, 606. See also *Mathews v. Case*, 61 Wis. 491; 50 Am. Rep. 151.

TEN EYCK v. WITBECK.

[135 NEW YORK, 40.]

CONSIDERATION MERELY NOMINAL DOES NOT CONSTITUTE GRANTEE PURCHASER FOR VALUE.—A grantee of valuable property for a merely nominal money consideration actually paid, but where all the circumstances attending the transaction are indicative of a gift, is not a purchaser for a valuable consideration within the meaning of the recording act, and his deed, although recorded, conveys no title as against a prior unrecorded deed of the same property. To constitute a grantee a purchaser for value, the consideration of the grant must be not only good, but valuable, in the sense that a fair equivalent is given for the property granted. Where, therefore, the owner of a farm worth twenty thousand dollars conveys it to his wife, and six years after, and before the former deed is recorded, conveys it to his daughter by a deed reciting a consideration of ten dollars and the annual payment to the grantor, during his lifetime, of the entire net proceeds of the farm, and of one third of such proceeds to his wife during her lifetime if she survived him, and of one third thereof to another daughter for the same period, and of one half of such proceeds to her after the death of both parents, giving to the grantee power to sell the property after her mother's death, the use of one half of the proceeds to be given to her sister during her life, the grantee under the second deed is not a subsequent purchaser for value within the meaning of the statute, and her deed, though first recorded, is no bar to an action of ejectment brought against her by the successors in interest of the grantee under the first deed.

EJECTMENT. The opinion states the case.

Nathaniel C. Moak and J. H. Clute, for the appellants.

Matthew Hale, for the respondents.

MAYNARD, J. The single question presented by this appeal relates to the rights of the parties under the recording act. The property in controversy is a farm in the town of Coeymans, concededly worth twenty thousand dollars. Peter W. Ten Eyck is the common source of title. The plaintiffs claim

under a deed prior in date; the defendant Catherine Witbeck under a deed prior in registry. The plaintiffs' conveyance is declared by statute to be void as against the defendant, providing she was a purchaser in good faith and for a valuable consideration. In the sense that she had no notice of the existence of the prior deed, the *bona fides* of her purchase is not disputed. The issue is therefore narrowed to the question whether she was a purchaser for a valuable consideration. The deed was executed July 7, 1887. The grantor was her father, and it recited a consideration of ten dollars, and the annual payment to the father, during his lifetime, of the entire net proceeds of the farm, and of one third of such proceeds to his wife during her lifetime if she survived him, and of one third thereof to another daughter for the same period, and of one half of such proceeds to her after the death of both parents. The grantee was given power to sell the property after the mother's death, and if sold, the use of one half of the proceeds of sale should be paid to the sister during her life, but the principal should be managed and controlled by the defendant. It was proved that ten dollars in money was actually paid by her to her father at the time of the execution of the deed. Peter Ten Eyck's family then consisted of his wife and two daughters, who lived with him upon the farm, except the defendant, Mrs. Witbeck, who lived with her husband upon another farm in the same town. Immediate possession was not taken by her under her deed, but her father, with the rest of the family, continued to reside upon the farm, and, by himself and tenants, to manage and control it until his death, in 1883, after which it was in the same manner occupied by the mother and unmarried daughter until the death of the mother in 1885. In September, 1871, Ten Eyck, through an intermediate grantee, conveyed this property to his wife, who, in January, 1883, conveyed it to the plaintiffs. The defendant's deed was recorded December 5, 1879, but Mrs. Ten Eyck's deed, under which the plaintiffs claim, was not recorded until February 21, 1883.

After Mrs. Ten Eyck's death the defendant took possession, and the plaintiffs brought this action in ejectment. The defendant challenged the validity of the plaintiffs' title, upon the ground of the mental incompetency of Mr. Ten Eyck, and the undue influence of his wife over him when the deed to her was executed, and of its alleged non-delivery, as well as the non-delivery of the deed from Mrs. Ten Eyck to the plaintiffs,

and upon the further ground that Mrs. Ten Eyck's deed was void as to defendant, under the recording act.

The trial court held that the defendant was not a purchaser for a valuable consideration, and was not, therefore, within the protection of the statute, but submitted to the jury the question whether the deeds under which plaintiffs claimed had ever been delivered, and whether Peter W. Ten Eyck was of sound mind and free from undue influence when he executed the conveyance to his wife. The verdict was for the defendant, and the general term intimate very plainly that, in their opinion, it was not supported by the evidence, and that they would have set it aside were it not for the decision of the general term in the fifth department in the case of *Hendy v. Smith*, 49 Hun, 510, which holds that a grantee for a consideration of one dollar paid is a purchaser for a valuable consideration, as the terms are used in the recording act. They felt constrained to regard this authority as controlling, and to hold, as matter of law, that the defendant had a superior title because of the prior record of her deed, and that the verdict and judgment were therefore right. The order of affirmance states that but for the recording act the judgment appealed from would have been reversed.

From the relationship of the parties, the recitals in the defendant's deed, and the circumstances attending its execution, as disclosed by the evidence, it is, we think, apparent that she cannot be regarded as a purchaser for a valuable consideration, so as to avoid the effect of the plaintiffs' prior conveyance. While every legal mode of acquisition of real property, except by descent, is denominated in law a purchase, and the person who thus acquires it is a purchaser, it is evident that the word is used in this statute in a much more limited sense. It is there applied only to such grants of real estate as are obtained for money, or some other valuable consideration. It denotes a buyer of property, and has reference to one of the actors in a transaction of bargain and sale, which is presumably controlled by commercial considerations.

We think it would be a perversion of language to say that a father who had conveyed to a daughter property of the value of twenty thousand dollars for no greater sum than ten dollars paid had sold the property to his child, or that she bought it of him. The transfer would be recognized by the popular as well as the judicial mind as possessing all the

essential qualities of a gift. It has been frequently so held. In *Hayes v. Kershow*, 1 Sand. Ch. 265, the consideration recited in the deed was one dollar paid, and love and affection, and the vice-chancellor said that this nominal sum was not such a valuable consideration as would support a bargain and sale.

In *Duvoll v. Wilson*, 9 Barb. 487, the conveyance was to the grandchildren of the grantor, and recited a consideration of five dollars paid; and it was held that it was not sufficient to support a covenant to stand seised.

In *Morris v. Ward*, 36 N. Y. 587, the conveyance was to a granddaughter, and recited a consideration of one dollar paid, and natural love and affection, and this court held that it was an advancement, and not a sale, and that the grantee took as donee, and not as purchaser, and that it was competent, when the whole instrument shows the money consideration to have been intended as nominal merely, to give effect to such proof and to the intention which it indicates.

It is true that in these cases it was assumed or conceded that the nominal money consideration expressed had not been actually paid; but we do not understand that any emphasis was placed upon that fact. The decision in each case seems to have been put upon the ground that the nominal was not the real consideration.

In the case before us every feature of the transaction is indicative of a gift. The grantor was eighty-two years of age, and the grantee was his eldest daughter. He was evidently conscious that the end of his life was near, and desired to make some final disposition of his real property for the benefit of his family, through the medium of this daughter, in whom, for the time being, he seems to have had especial confidence. If in the full possession of his mental faculties, he must have known that he had previously conveyed the property to his wife. Apparently there was a struggle between the different members of his household for the possession and control of the farm, which destroyed that quietude and repose so grateful to old age. He may have thought that in this way he could appease both factions, trusting that each might remain in ignorance of the *status* of the other until he died, when the result of the complications which he had created would be a matter of indifference to him. But we need not speculate as to his motives. We must deal with the fact of the execution of the later deed as we find it on the record, and the extent and quality of its consideration as shown by the proofs. It is

plain that the real consideration which the grantor had in mind when he made the conveyance was not the receipt of an insignificant sum of money, but the provision which he was thereby making for the benefit of the different persons who composed his family, and all of whom had just claims upon his bounty. By its terms no one in fact would enjoy the use of the property until after his death, for he reserved to himself the entire net rents and profits during his lifetime. The instrument was therefore most emphatically of the character and intended to take the place of the usual testamentary distribution of a decedent's property.

So far as the cases of *Webster v. Van Steenburgh*, 46 Barb. 211, and *Hendy v. Smith*, 49 Hun, 510, hold a contrary doctrine, they do not have our approval.

On the other hand, the cases of *Fullenwider v. Roberts*, 4 Dev. & B. 278, *Worthy v. Caddell*, 76 N. C. 82, *Upton v. Bassett*, Cro. Eliz. 445, *Doe v. Routledge*, Cowp. 705, and *Metcalf v. Pulvertoft*, 1 Ves. & B. 183, so far as they hold that a purely nominal consideration is insufficient to protect the subsequent purchaser, are in harmony with the views we have expressed.

We deem it unnecessary to undertake to determine here what degree of adequacy of price is required to uphold a subsequent deed first recorded. Upon this branch of the case we have no occasion to go, further than to hold that a small sum, inserted and paid perhaps because of a popular belief that some slight money consideration is necessary to render the deed valid, will not of itself satisfy the terms of the statute, where it appears upon the face of the conveyance, or by other competent evidence, that it was not the actual consideration. Where the subsequent conveyance is a mortgage, and only part of the consideration paid, there can be but little difficulty in properly adjusting the equities of the parties, for the mortgagee can then be considered as a *bona fide* purchaser, *pro tanto*, and the mortgage enforced to the extent to which he has parted with value upon the faith of it: *Merritt v. Northern R. R. Co.*, 12 Barb. 605; *Pickett v. Barron*, 29 Barb. 505; *Williams v. Smith*, 2 Hill, 301; *Stalker v. McDonald*, 6 Hill, 96; 40 Am. Dec. 389; *Peabody v. Fenton*, 3 Barb. Ch. 451.

But in case of a deed having a mixed consideration, — that is, partly valuable and partly good, — such a rule would be difficult of application, if not impracticable, and no case has been cited where the question has arisen in that form. There is

an *obiter* remark by Judge Hand, in *Merritt v. Northern R. R. Co.*, 12 Barb. 605, that such a grantee may be considered a purchaser for value as to the entire title. The point, however, is not involved in a case like the present, where the money consideration is purely nominal, or infinitesimal in amount when compared with the value of the property granted, and is shown not to have been the real inducement of the grant.

It is proper to observe here that the good faith of a purchaser may be seriously impaired, if not destroyed, by the inadequacy of the price at which the property is offered by a person claiming to be its owner. If the sum which the seller is willing to take is grossly disproportionate to the value of the thing which is the subject of the negotiation, it is strong proof of a defective title, and sufficient to put a prudent man upon inquiry, and if the buyer neglects to diligently prosecute such inquiry, he may not be awarded the standing of a *bona fide* purchaser.

It may be said that this rule would not hold good where the relation of parent and child exists, because of the natural and laudable desire of the former to share his worldly possessions with the latter, which is merely equivalent to saying that the actual consideration in such cases is not a pecuniary one.

It is strenuously urged by counsel that the considerations expressed in defendant's deed, other than money, are sufficient to invest her with the title of a purchaser for value. It is not important to determine how these provisions should be construed, — whether as reservations out of the property granted, or as creating a trust for the benefit of the grantor and others, or as implied covenants on the part of the grantee to annually account for the net income of the property in the manner specified. Unquestionably, as between the parties, the defendant, by the acceptance of the deed, became bound to observe its conditions, and to render to the beneficiaries named their respective shares of the net rents and profits of the farm. But this was simply an obligation to account for the use of the property, which was the subject of the grant; and while it might be a good consideration for the conveyance, it was in no respect a valuable consideration, as that term has been judicially defined. If, for any cause, the grant itself becomes nugatory, the covenant ceases to be operative. In order to give effect to the promise, effect must be given to the deed, and if the defendant is deprived of the land, she is relieved from the obligation which she assumed on the faith of the

grant: *Dunning v. Leavitt*, 85 N. Y. 30; 39 Am. Rep. 617; *Rice v. Goddard*, 14 Pick. 293.

There is a wide distinction between a good and a valuable consideration, when the latter term is used in the statutes defining the rights of a subsequent purchaser. Blood, love, and affection, future support, a precedent indebtedness, and the like, are, either of them, sufficient as a consideration between the parties, but neither is potential enough to override the prior equities of others in the property conveyed.

The phrase, "a purchaser in good faith, and for a valuable consideration," is not peculiar to the recording act, but is one of frequent occurrence in the statutes. It can be found in the chapters on trusts (4 Rev. Stats., 8th ed., p. 2437, secs. 51, 54); on powers (p. 2451, sec. 132); on conveyances (p. 2452, sec. 144); and on frauds (p. 2593, sec. 5). It is an expression which has been borrowed from the language of courts of equity, and should be interpreted in the sense in which it is there understood. As pointed out by Chancellor Walworth, in *Dickerson v. Tillinghast*, 4 Paige, 215, 25 Am. Dec. 528, it has a curious and instructive history in connection with its introduction into the recording act. The English registry law made the prior unrecorded deed wholly void as against the subsequent grantee, without reference to the question of notice or the payment of value. Immediately, the court of chancery, with characteristic diligence, sought to relieve the earlier grantee from the hardship which the enforcement of the letter of the law might inflict, and while respecting the command of the statute, which made his deed void at law, it invested him with an equitable title, which it declared should prevail over the legal title of the subsequent purchaser, if it appeared that he had notice of its existence, or did not part with value at the time of the purchase. This rule of judicial construction was incorporated by the legislature into the *lex scripta*, in almost the identical words in which it had been phrased by courts of equity. A valuable consideration has been defined by writers upon equity jurisprudence as something "which the law esteems as an equivalent given for the grant, and it is therefore founded on motives of justice": 1 Story's Eq. Jur., 10th ed., sec. 354. If the subsequent grantee does not give up any security, or divest himself of any right, or place himself in a worse situation than he would have been if he had received notice of the prior equitable title or lien, previous to his pur-

chase, he will not be permitted to retain the legal title, to the injury of the prior grantee.

Or, as it was tersely stated by Allen, J., in *Weaver v. Barden*, 49 N. Y. 291, a purchaser for a valuable consideration is a purchaser "for value paid." This limited application of the term is entirely consistent with the scope and purpose of the recording act, which was declared by the chancellor, in *Dickerson v. Tillinghast*, 4 Paige, 215, 25 Am. Dec. 528, to be the protection of "those who should part with their money, property, securities, or other valuable rights, upon the faith of a conveyance or mortgage of real estate, supposing that they were getting a good title thereto, or a legal and specific lien thereon, without notice or having any reason to believe that there was any previous mortgage or conveyance which could defeat such title or lien."

If the rejection of the later conveyance will leave the grantee in the same position, with respect to his property rights, as he occupied before its execution and acceptance, he cannot be permitted to aid, however innocently, the fraudulent grantor in his effort to defeat a prior conveyance by him of the same lands. Where the grantee parts with nothing of substantial value, he must be satisfied if he receives nothing, because his grantor had nothing which he could honestly convey. The considerations, other than money, upon which the defendant relies, when submitted to this equitable test, fall far short of satisfying its requirements. If her deed is adjudged void, she has not lost or sacrificed anything which she possessed when it was executed, nor become encumbered with any promise or obligation which will result in a future loss or sacrifice. She has therefore failed to establish her title as a purchaser for a valuable consideration.

Whether there was sufficient evidence to go to the jury upon the issue of fraud and undue influence in the execution of the deeds under which the plaintiffs claim, or of their non-delivery, we cannot now consider. The general term has not yet passed upon that question.

The order appealed from should be reversed, and the case remitted to the general term for a review upon the facts, with costs to abide the event of the action.

DEEDS — PURCHASER FOR VALUABLE CONSIDERATION. — A purchaser who buys in ignorance of a prior unrecorded deed without paying the purchase-money in full is not a *bona fide* purchaser: *Beane v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71. The inadequacy of consideration, in order to avoid a

deed, must be so glaring as to stamp the transaction with fraud and shock the common sense of honesty: *Feigley v. Feigley*, 7 Md. 537; 61 Am. Dec. 375, and note. A pecuniary consideration, however small, will support a deed of bargain and sale: *Bell v. Scammon*, 15 N. H. 381; 41 Am. Dec. 706. As against an existing creditor whose debt was reduced to judgment before the execution of the conveyance, the burden is upon the grantee to prove that the consideration was valuable and sufficient: *Caldwell v. Pollack*, 91 Ala. 353. See also extended note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 739.

WILSON v. CITY OF TROY.

[135 NEW YORK, 26.]

MUNICIPAL CORPORATION, LIABILITY OF, FOR NEGLIGENT ACTS OF ITS EMPLOYEES. — In an action to recover damages resulting from the negligence of the employees of a department of a city government in leaving open and unguarded an excavation in one of its streets, made by them for the purpose of enabling plumbers to connect the water-mains owned by the city with a private residence, with whose owner the plumbers contracted to make such connection, where such employees were paid by the city, but the amount paid to them was afterwards refunded to the city by the plumbers, the work having been done under the direction of the superintendent of the water-works of the city, and an ordinance or by-law prohibiting any person except such superintendent, or some person employed by him, or the board of water commissioners, from tapping or making any connection with the mains, unless by the permission or under the direction of the superintendent, the question whether the plumbers or the city sustained the relation of master to such employees is one of fact for the jury, whose finding against the city is conclusive that the city itself caused the excavation to be made and left it unguarded.

NOTICE TO MUNICIPAL CORPORATION OF DEFECT IN STREET NOT NECESSARY WHEN. — In an action brought by a person injured by the neglect of a city to properly guard a place in its street, made dangerous by its own act, it is not necessary to prove notice to it of the defect.

INTEREST ALLOWABLE, IN DISCRETION OF JURY, UPON SUM LOST THROUGH DEFENDANT'S NEGLIGENCE. — Where the value of property is diminished by an injury wrongfully inflicted, the jury may, in their discretion, give interest, by way of damages, on the amount by which the value is diminished, from the time of the injury.

ACTION to recover damages for injuries to a horse. The opinion states the facts.

William J. Roche, for the appellant.

Charles E. Patterson, for the respondent.

O'BRIEN, J. The record in this case presents two questions:

1. Whether the finding of the jury that the damage was the

result of the defendant's negligence is sustained by any evidence; and 2. Whether interest could legally be allowed by the jury in estimating the amount of the damages. On the night of the 13th of November, 1879, a valuable horse belonging to one Learned, plaintiff's assignor, while being driven through South Street, in the city of Troy, fell into an open ditch or unguarded excavation made during that day, and was permanently injured. There is little, if any, controversy with respect to the value of the horse, the extent of the injury, or the amount of damages. The night was dark, and it is not denied that there was evidence for the jury sufficient to sustain a finding of negligence on the part of some one, by reason of the failure to protect a place of danger in a public street by proper guards and lights. It was not shown that the city had any actual notice of the existence of the excavation, if made by private parties without its permission, and a sufficient period had not elapsed between the time of opening it and the accident to render the city liable on the ground of implied notice. The excavation was made for the purpose of conducting the water from the principal main in the street, through lateral pipes, into a private house. The owner of the house employed a firm of plumbers to do the work, which included the digging of the trench, as well as laying and connecting the lateral pipes with the main in the street. The firm applied to the superintendent of the water-works for men to open the trench in the street, and that officer directed laborers in the employ of the city to do so. The opening in the street was made by them, and they were paid for the work by the city, the plumbers refunding to it the sum so paid. The question is, whether the men who dug the ditch were under the control and direction of the defendant, or subject to the orders of the plumbers engaged in performing a piece of work for the owner of the house. The system of water-works in Troy is the property of the municipality, and is under the management and control of a board of water commissioners, which may be regarded as a department of the city government. The commissioners are by law required to nominate, and the common council of the city to appoint, a superintendent of the water-works, who is the executive officer in that department, and who, in this case, directed the men in the employ and pay of the city to make the excavation in the street. The board is authorized by law to extend the distributing-pipes of the water-works wherever they might

think proper, and to make such alterations and improvements in the works, and in the management and preservation thereof, as they might deem necessary and expedient, and to employ such persons and assistants as they might require to execute any of these purposes, which employees were to be paid for their services from the city treasury. The commissioners were also empowered to enact such by-laws, regulations, and ordinances as they should deem necessary for the protection of hydrants and water-pipes, and the preservation, protection, and management of the water-works. These by-laws, unless disapproved by a vote of two thirds of all the members of the common council of the city, were to have all the force and effect of law.

In pursuance of the power thus conferred by the statute, the board of water commissioners enacted by-laws and ordinances on the subject, which were in force at the time the excavation in question was made. They, in effect, prohibited any person, except the superintendent and those employed by him or by the commissioners, to tap or make any connection with the main, or distributing-pipe, or to permit the same to be done, unless by the permission and under the direction of the superintendent.

The learned counsel for the defendant contends that this regulation simply forbids the act of connecting the lateral pipes from the house with the main, and did not prohibit private persons from digging the necessary trenches and uncovering the main, or distributing-pipe, and hence that part of the work was done by the contractors, who were employed by the owner of the house to make the connection, and not by the city. But a private individual had no right to dig in the street for this or any other purpose without the permission of the proper municipal authorities; and the object as well as the language of the ordinance indicates that it was intended to prevent the uncovering of the main, or any interference with the street in which it was placed, by private parties. At all events, the water board and its chief executive officer, the superintendent, in the discharge of the duties imposed upon them by the statute, might very properly give to it that construction and act accordingly. To hold that such a by-law did not embrace within its object and purview the evils that might result from unguarded and unregulated interference with the bed of the street by private parties, in order to reach the main, would be giving to it a construction altogether too

narrow. The evidence tends to show that the water board gave to it the broader and more comprehensive meaning, as it was the custom and practice for years before the accident in question to make application to the superintendent for men to do the digging, and they were always furnished, as in this case. As between the owner of the house and the plumbers employed by her to introduce the water into her house, the digging was undoubtedly a part of the contract or work of the latter. If no main had been placed in the street at that time, they could also have contracted with her to procure its extension, but that part of the work would be subject to the action and regulations of the water board; and while the contractors might be obliged to pay the city for the whole or some part of the expense, it would be none the less the work of the city. One of the plumbers testified that while he agreed with the owner of the house to do all the work, yet he knew then that it was the practice and custom to apply to the superintendent of the water-works for men to do the digging and to make the connection, and acted upon the assumption that he had no right to do it. He also says that the men who made the excavation were not employed by him, but by the city. We think that, upon the proof, it could not be held, as matter of law, that the men who dug the trench and left it unguarded ceased for the time being to be the servants of the city and subject to the directions of the superintendent, and became, while doing this job of work, the servants of the party employed to put in the lateral pipes into the house, as is urged by the learned counsel for the defendant. What party sustained the relation of master to the men who dug the trench, and had the control and direction of them, and was charged with the duty of directing them to properly guard the ditch, whether the plumbers, on the one hand, or the city, through the superintendent of the water-works, on the other, was the important question to be determined, and the trial court submitted it to the jury. Under all the circumstances, the question became one of fact, and this disposition of it was not error: *Ward v. New England Fibre Co.*, 154 Mass. 420.

The finding of the jury is conclusive upon us, and imports that the city itself, through one of its officers or departments, caused the trench to be dug, and left it unguarded, resulting in the damage complained of. In such a case the negligent act is imputable to the city, and the doctrine of actual or implied notice has no application, or at least is unnecessary,

where one injured by the neglect of the city to properly guard a place made dangerous by its own act brings the action: *Pettengill v. City of Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 442; *Walsh v. Mayor etc.*, 107 N. Y. 220; *Turner v. City of Newburgh*, 109 N. Y. 801; 4 Am. St. Rep. 453; *Brusso v. City of Buffalo*, 90 N. Y. 679; *Russell v. Village of Canastota*, 98 N. Y. 496; *Nelson v. Village of Canisteo*, 100 N. Y. 89; *Ehrgott v. Mayor etc.*, 96 N. Y. 273; 48 Am. Rep. 622; *Burnes v. District of Columbia*, 91 U. S. 540.

The amount demanded in the complaint on account of the injury to the horse was three thousand dollars, and the court instructed the jury that they could not, in awarding damages, go beyond that sum, with interest. The defendant's counsel excepted to this, in so far as it authorized interest, and requested the court to charge that the jury could not allow interest in the action. The court declined to so charge, and the defendant's counsel excepted. The jury afterwards came into court and announced that they had found a verdict for the plaintiff for three thousand dollars and interest. The court then said: "You must compute the interest if you give interest; you will have to render your verdict in dollars and cents." This direction was complied with, and the verdict as entered included interest from the date of the injury, which result has been modified by the general term, by striking out the interest awarded prior to the date of the presentation of the claim to the city, which was held to be a prerequisite to the maintenance of the action. The fair construction of the charge is, that the jury could include in the damages interest upon the sum found to represent the diminished value of the horse, in consequence of the injury, and not that the plaintiff was entitled to interest as matter of right. The exception therefore presents the question whether, in an action to recover damages to property by reason of negligence on the part of the defendant, it is within the power of the jury, in the exercise of discretion, to include in their award of damages interest on the sum found to represent the diminished value of the property in consequence of the injury from the time that the cause of action accrued. When interest may be allowed as part of the damages in actions of this character is a question which, in the present state of the law, is involved in much confusion and uncertainty, and in regard to which the decisions of the courts are not harmonious. It is perhaps impossible to formulate a general rule embracing every

possible case. The tendency of courts in modern times has been to extend the right to recover interest on demand far beyond the limits within which that right was originally confined. What seemed to be the demands of justice did not permit the principle to remain stationary, and hence it has been for years in a state of constant evolution. This, in some measure, accounts for many of the apparently contradictory views to be found in the adjudged cases. There are certain fundamental principles, however, established by the decisions in this state, which, when properly applied, will aid in the solution of the question. There is, of course, a manifest distinction, always to be observed, between actions sounding in tort and actions upon contract. In the latter class of actions, there is not much difficulty in ascertaining the rule as to interest until we come to unliquidated demands. The rule in such cases has quite recently been examined in this court, and principles stated that will furnish a guide in most cases: *White v. Miller*, 78 N. Y. 393; 34 Am. Rep. 544.

We are concerned now only with the rule applicable in actions of tort. The right to interest, as a part of the damages, in actions of trover and trespass *de bonis asportatis* was given first in England by statute 3 and 4 William IV. The recovery was not, however, allowed by that statute as matter of right, but in the discretion of the jury. The earlier cases in this state followed the rule thus established in England, and permitted the jury, in their discretion, to allow interest in such cases: *Beale v. Guernsey*, 8 Johns. 446; 5 Am. Dec. 348; *Hyde v. Stone*, 7 Wend. 354; 22 Am. Dec. 582; *Bissell v. Hopkins*, 4 Cow. 53; *Rowley v. Gibbs*, 14 Johns. 385.

The principle that the right to interest in such cases was in the discretion of the jury was, however, gradually abandoned, and now the rule is, that the plaintiff is entitled to interest on the value of property converted or lost to the owner by a trespass as matter of law. The reason given for the rule is, that interest is as necessary a part of a complete indemnity to the owner of the property as the value itself, and in fixing the damages, is not any more in the discretion of the jury than the value: *Andrews v. Durant*, 18 N. Y. 496; *McCormick v. Pennsylvania C. R. R. Co.*, 49 N. Y. 315; *Buffalo etc. Co. v. Buffalo*, 58 N. Y. 639; *Parrott v. Knickerbocker etc. Ice Co.*, 48 N. Y. 369. It is difficult to perceive any sound distinction between a case where the defendant converts or carries away the plaintiff's horse, and a case where, through negligence on

his part, the horse is injured so as to be valueless. There is no reason apparent for a different rule of damages in the one case than in the other. In an early case in this state, the principle was recognized that interest might be allowed, by way of damages, upon the sum lost by the plaintiff in consequence of defendant's negligence: *Thomas v. Weed*, 14 Johns. 255.

We think the rule is now settled in this state, that where the value of property is diminished by an injury wrongfully inflicted, the jury may, in their discretion, give interest on the amount by which the value is diminished from the time of the injury. That is the rule laid down in the elementary books and sustained by the adjudged cases: 1 Sedgwick on Damages, 8th ed., secs. 317, 320; *Walrath v. Redfield*, 18 N. Y. 457, 462; *Mairs v. Manhattan R. E. Ass'n*, 89 N. Y. 498; *Dur-yes v. Mayor etc.*, 96 N. Y. 477, 499; *Home Ins. Co. v. Pennsylvania R. R. Co.*, 11 Hun, 182, 188; *Moore v. New York etc. R. R. Co.*, 126 N. Y. 671; *Pennsylvania etc. R. R. Co. Ziemer*, 124 Pa. St. 560.

There is a class of actions sounding in tort in which interest is not allowable at all, such as assault and battery, slander, libel, seduction, false imprisonment, etc. There is another class in which the law gives interest on the loss as part of the damages, such as trover, trespass, replevin, etc. And still a third class, in which interest cannot be recovered as of right, but may be allowed, in the discretion of the jury, according to the circumstances of the case. This action belongs to the latter class, and, as we have construed the charge as a direction that the jury might, in their discretion, allow interest on the diminished value of the horse, it was not erroneous.

Our attention has been called to the case of *Sayre v. State*, 123 N. Y. 291, and it is urged, upon the authority of that case, that interest cannot be allowed in any case for the recovery of unliquidated damages arising from negligence. We think that the case, when correctly understood, does not sustain the contention, but, in effect, holds the contrary. In that case a party appealed from the decision of the board of claims upon an award in his own favor, and the only question was, whether, upon the evidence and findings, the claimant had been allowed all the damages that he was entitled to, and this court not only affirmed his right to all the damages that the board had awarded him, but increased the award from \$3,000 to \$8,136. The claim was based upon the negligent

act of the state in overflowing the lands of the claimant, from which the damages claimed resulted. The board of claims allowed no interest, nor did this court. In adding to the award a sum of over five thousand dollars, this court acted, in some sense, as a court of original jurisdiction, and in making up the sum which was to constitute the final award, it refused to allow an item of interest claimed. Now, it is admitted that a court or jury charged with the duty of making up the amount of damages in such cases may refuse to allow interest, and that is precisely what this court did, and nothing more, and therefore the case is in harmony with the rule above stated, and with the cases from which we have deduced it. It is far from holding that it is error when, in such a case, the jury or the original court, after considering all the facts and circumstances bearing upon the loss, allows interest, in the exercise of discretion, as part of the indemnity to which the party is entitled. It simply recognized the rule that interest in such cases was not a matter of right, but of sound discretion, and held that the claimant was fully indemnified for his loss without adding interest. It is true that the learned judge who gave the opinion cited the cases arising upon contract in which it has been held that interest is not allowable, and remarked that he found no case justifying an allowance of interest. That was probably an inadvertence, but the decision refusing interest was right, though the reasons may have been based upon a principle applicable to another class of actions. It must be remembered that the court was not reviewing any question decided below in regard to interest, but seeking to make up for itself a new award from the items of the claim appearing in the record, and whatever was said by way of argument, and as the reason for throwing out an item of interest on a sum claimed to have been expended in restoring or reclaiming the land, cannot be considered as the judgment of the court on the question now under consideration. That question was not noticed in the argument, and was not involved in the case, except, perhaps, as a matter of discretion. For these reasons the judgment should be affirmed.

MUNICIPAL CORPORATIONS. — LIABILITY FOR NEGLIGENT ACTS OF ITS EMPLOYEES: See extended note to *Goddard v. Harpswell*, 30 Am. St. Rep. 376-413, and the other monographic notes there referred to. The liability for injuries caused by unguarded excavations is treated at page 336 of the note to *Goddard v. Harpswell*.

MUNICIPAL CORPORATIONS. — NOTICE OF DEFECTS in streets, etc., is al-

ways imputed to a city, where the circumstances from which the injury results arise from defects inherent in the plan of construction adopted. So held where injuries were caused by the displacement of a cover over a street sewer: *Barr v. City of Kansas*, 105 Mo. 550; and by a want of repairs in a sidewalk: *Weber v. Creston City*, 75 Iowa, 16. Under ordinary circumstances, the question of notice is one for the jury: *McNally v. City of Coloe*, 127 N. Y. 350; *City of Bradford v. Downs*, 126 Pa. St. 622; *Fort Worth v. Johnson*, 84 Tex. 137.

INTEREST MAY BE GIVEN AS PART OF DAMAGES, in an action of trover or trespass, from the time of the conversion or injury complained of: *Rippey v. Miller*, 1 Jones, 479; 62 Am. Dec. 177; *Stephens v. Koonce*, 103 N. C. 266; and upon sums of money fraudulently appropriated by persons holding positions of trust: *Wayne Pike Co. v. Hammons*, 129 Ind. 368; *Diemel v. Brown*, 136 Ill. 587. In an action for damages for destruction of property by negligence, interest on the damages from the time of destruction is allowable: *Allegheny v. Campbell*, 107 Pa. St. 533; 52 Am. Rep. 478; *Jacksonville etc. Ry Co. v. Peninsular Land etc. Co.*, 27 Fla. 1.

IN THE MATTER OF THE APPLICATION OF THE MAYOR ETC. OF NEW YORK TO ACQUIRE TITLE TO WHARF PROPERTY, ETC.

[135 NEW YORK, 263.]

EMINENT DOMAIN — PUBLIC DUTY TO PROVIDE FOR NECESSITIES OF COMMERCE — PUBLIC USE. — To minister to the necessities of commerce by providing suitable places in a seaport, where ships can be loaded and unloaded, with all proper facilities, is a public duty owing by the state, and, through it, by the municipality which governs and controls the port, and the necessities of the business are the only standard by which to judge of the extent of this duty. If a permanent pier and an exclusive right to its use be a necessity of large steamship lines, without which business cannot be properly transacted, the duty rests upon the state or the municipality to furnish such accommodations, or to permit the steamship companies to obtain them from private owners; and when the state has imposed upon the municipality the performance of this duty, all appropriate acts done by it in such performance are for a public purpose. Lands needed by a municipality bound to perform such a duty for the construction of piers and wharves are therefore required for a public use, and may be taken in the exercise of the right of eminent domain, although some portion of them may thereafter be, in the discretion of the city, divided off and placed in the exclusive possession of a lessee, for the sole purpose of using it in the transaction of the necessary business connected with the loading and unloading of passengers and cargoes of ships and steamers.

LAND OWNED BY RAILROAD OR GAS COMPANY MAY BE TAKEN FOR WHARF PURPOSES UNDER NEW YORK CONSOLIDATION ACT. — Although property devoted to one public use will not be regarded as subject to the right of condemnation for another public use, unless the statute plainly

grants such right, it is not necessary that the statute should, in terms, so enact, but it is sufficient if the right is conferred by necessary implication from the language used. The New York consolidation act contains a sufficient grant of power to include in condemnation proceedings property of the nature therein described, even when owned by a railroad or gas company, and used by it for landing freight or other property; and it is not necessary, in such proceedings, to show that the property to be taken is needed for the purpose of building any particular pier, dock, or bulkhead, if it be required to carry out the general plan.

APPEAL of the New York Central and Hudson River Railroad Company from orders of the general term affirming orders of the special term appointing commissioners in proceedings to acquire title to certain real estate. The facts are stated in the opinion.

Henry H. Anderson, for the appellant.

Charles Blandy, for the respondent.

PECKHAM, J. In the above title are comprised three separate and distinct proceedings on the part of the city authorities to acquire title to the lands particularly described in the several petitions.

The land described in the first petition is situated between Thirty-fourth and Thirty-fifth streets, and belongs to the New York Central and Hudson River Railroad Company, although the legal title thereto is vested in the individuals Cornelius and William K. Vanderbilt. It is used by the company for the purposes of its business.

The fee of the land described in the second petition, and which lies between Thirty-fifth and Thirty-sixth streets, belongs to the estate of the late Marshall O. Roberts, and the property has been leased by the executors of his will to the New York Central and Hudson River Railroad Company for purposes connected with the business of that corporation.

The land described in the third petition, and lying between Forty-first and Forty-second streets, belongs to the Consolidated Gas Company of the city of New York, and is in use by that corporation for its own purposes.

The proceedings to acquire the various interests connected with these lands were inaugurated by the city authorities in the due prosecution of the general plan duly adopted by the proper city officers, pursuant to the various statutes relating to the construction, possession, ownership, and maintenance

by the city of piers and bulkheads in the North and East rivers.

The application for the appointment of commissioners to appraise the value of the property to be taken was opposed in each instance by those owning or interested in the property. At special term the application was in each case granted, and the general term, upon appeal, affirmed the order appointing the commissioners. An appeal has been taken from each order to this court.

The parties who oppose these proceedings do so upon three principal grounds: 1. They maintain that the act which permits the city to appropriate any of the wharfs, piers, etc., to the sole use of special kinds of commerce or of steamboats, and also to lease the piers or property, does thereby, in effect, provide for a private use of such property, and they say that property which is intended for private use cannot be acquired against the will of its owner by the exercise of the power of eminent domain, either by the state itself, or, as in this instance, by its agent or substitute, the city of New York. 2. They claim that the property, or some part of it, is already devoted to public use by the railroad and the gas companies, and cannot be condemned to any other public use under a general act of the legislature. 3. They also urge that the statute contemplates a real and actual, although ineffectual, attempt to agree upon a price to be paid for the land as a condition precedent to the right of the city to exercise the power of eminent domain, and in each of these proceedings it is contended that no real *bona fide* attempt to agree upon such price was ever in fact made.

The first ground taken by the owners, if tenable, is conclusive against the maintenance of these proceedings. It strikes at the foundation of the whole proceeding, and no step can be taken which will avoid the objection. Private property cannot be taken for private use against the will of its owner, even upon full compensation being made. The objection raises a most important question. If the leasing to a particular steamship line, to the exclusion of all others, certain parts of the water-front upon which a bulkhead and a pier have been erected, make the use of the pier a private use, one owner of wharfage rights may refuse to sell, and thus absolutely prevent the building of a pier in that locality by the city, and thus also obstruct to that extent the development of the general plan for docks and piers adopted by the officers of the

city under authority of the legislature. The learned counsel for the owners cites many cases to show that the use to which the property is to be applied must be a public use. The question whether or not it be such a use is a judicial one. There is, as I think, unquestionably a distinction between the use which is public and an interest which is public, and where there is simply a public interest, as distinguished from a public use, the right of eminent domain cannot be exercised. The interest may be of a public nature when the use may tend incidentally to benefit the public in some collateral way. In such case the right to take property *in invitum* does not exist.

Speaking in general terms, I should say that the public must, under proper police regulations, have the right to resort to the land or property for the use for which it was acquired, independently of the mere will or caprice of any private person or corporation in whom the title to the property would vest upon condemnation. Otherwise the use could not be public. Cases might be cited which declare such principles. The case of *In re Eureka Basin etc. Co.*, 96 N. Y. 42, supports this general doctrine. In that case the use to which the company intended to put the land that it desired to acquire was held not to be a public use, and, among others, one reason for so holding was the fact that when acquired no one would have the right to resort to it upon any terms whatever against the arbitrary will of the company. It was also held that the company itself was not proceeding in good faith.

So, also, in regard to highways. It has been truly said it is not the amount of travel upon a highway which distinguishes it as a public instead of a private road. A private road might have the larger amount. It is the right to travel upon it by all the world, and not the exercise of the right, which makes it a public highway. A public highway to which the public had not the right of access would be an impossible creation. And so a public use might generally be defined as the use which each individual might of right demand upon the same general terms and for the same general purposes as any other individual.

These general definitions, however, do not always cover the case. The statement that the land must be intended for such use that all the public may resort to it upon the same terms was correct, undoubtedly, in those cases in which the rule itself has been thus formulated. It does not, however, accu-

rately describe, for instance, the public use of the land which has been taken for railroad purposes.

The public has a right of access to the various stations of the company, which right is necessary to enable the public to avail itself of the right of transportation. But it has no legal right to use the bed of the road for any purpose whatever. There is a right to demand crossings of the road under certain circumstances, but there is no general right of the public to use the land of the railroad company. In the case of such a corporation the right is transformed into a right on the part of all the public to demand at any station of the company transportation over its road upon the legal terms of compensation for person and property. It is this right on the part of the public which makes the use of the land by the company, upon which to lay its rails and plant its depots and freight-houses, a public use.

Other illustrations might be given to show, what is plain enough without them, that property may, under certain circumstances, be devoted to a special and particular public use, and yet the entire public be permitted to use it or have access to it only in a very restricted manner.

These observations bear, I think, upon the act which the defendants assail. If the pier or dock is leased to a lessee, the public necessarily is itself, to the extent of the possession of the lessee, excluded from the possession of it. At the outset it is, however, to be observed that the act of 1871, as set forth in section 716 of the consolidation act, does not provide that all the piers and docks when owned by the city shall be leased to the highest bidder at public auction, or at all. The property may not be leased to any one. It is to rest in the discretion of the corporation whether a lease of any portion shall be effected. It cannot, therefore, be said at present that the property required in these proceedings will ever be leased, and hence it could not be affirmed that the property was to be taken for private use, as such expression is construed by counsel for defendants. And when we come to examine the provisions and effect of the statute under consideration as to exclusive use for special kinds of commerce and the leasing of piers to lessees, we must consider the nature of the property which is to be so used or leased, and the object and purpose of such use must be viewed in connection with the whole of the property of like nature under the control and ownership of the city.

The legislation regarding the water-front of the city of New York has been quite frequently, of late years, under examination in this court.

The legislature conferred upon the city by a series of early statutes general authority to construct wharves, and the system adopted was for the city to convey the land under water to individuals, and they were required to fill up such land and construct wharves, and the right to collect wharfage was at the same time conferred upon them. The lands under water were conveyed to the city in fee, by acts of the legislature, and by charters and grants, to enable the city to fill in such lands itself, or to procure others to do it, as the interest of the city, or in other words, the demands of commerce, might require: *Langdon v. Mayor etc.*, 93 N. Y. 129.

This continued the general policy of the city and the state for a number of years. The state itself owed a duty to its own citizens to provide adequate means for the carrying on of the commerce which was sure to come to the one great seaport within its borders. That duty, as was observed by Finch, J., in *Williams v. Mayor etc.*, 105 N. Y. 419, 436, it early imposed upon the city and the citizens, by whom it has steadily been performed at great cost. In 1871 the legislature changed entirely the general system by which this duty of building bulkheads, docks, and piers had theretofore been performed.

Instead of devolving upon private owners the duty of building such structures, and giving to private individuals the right to collect wharfage, a general and vast system was provided for by the act of 1871, chapter 574. That system involved the adoption of a plan for the building of bulkheads and piers by the city itself along the whole water-front washed by the two rivers, and the collection of wharfage by the city as compensation for their use. In the opinion of the legislature the time had come when the duty to furnish facilities for commerce should no longer be performed by the action of private owners, and the right to collect wharfage should no longer reside with them, but should be reposed in the municipality which was to provide for the growing necessities of a commerce that was advancing with almost unheard of rapidity. The steps which were to be taken as provided by the legislation of 1871 have already been alluded to in detail in the cases above cited, and in *Kingsland v. Mayor etc.*, 110 N. Y. 569, and it is unnecessary to repeat them here.

The adoption of the plan spoken of contemplated the purchase or erection and the possession and ownership by the city of a great number of piers, to the exclusion of all private ownership, and built in accordance with such plan and in a manner uniform with an exterior line adopted by the city as and for a bulkhead line. In 1871 the transportation of persons and property from and to foreign ports by steamships had even then grown to such dimensions in the city of New York that it became practically impossible to transact the commercial business of the port unless these steamships had permanent piers at which they could load and unload their cargoes, and their numbers had become so great that not only were permanent piers a necessity, but the exclusive and entire possession of such piers had also become so necessary that it was impossible to think of doing the business which was to be transacted unless such exclusive use were in some way provided. To minister to the necessities of commerce by providing fit and proper places in a seaport where ships can be loaded and unloaded with all proper facilities is a public duty owing by the state, and, through it, by the municipality which governs and controls the port. The only standard by which to judge of the extent of the duty consists in the necessities of the business. If a permanent pier and an exclusive right to its use be a necessity of those large steamship lines, without which business cannot be properly transacted, and in the absence of which the steamers will be sent across the river to New Jersey, or to some other port, then the duty rests with the state or municipality to furnish such quarters for a fair compensation, or else the state is bound to permit the steamship companies to obtain such accommodations from private owners. Having undertaken the duty imposed upon it by the state to provide such accommodations as the interests of commerce fairly require, all appropriate acts by the city done in the performance of that duty are for a public purpose.

Land which is thus taken is taken for a public use, although some portion of all the land actually used may be thereafter, in the discretion of the city, divided off and placed in the exclusive possession of a lessee for the sole purpose of using it in the transaction of the necessary business connected with the loading and unloading of passengers and cargoes of ships and steamers.

If the necessity for exclusive use exist, such necessity ought to be recognized by the city, and the attempt to supply such necessity is an attempt to fulfill a public duty. The fact of exclusive use by the lessee must be considered with reference to all the other property of a like nature possessed by the city, and at which all necessary and proper facilities may be afforded for the remainder of the commerce of the port. If an act should be passed which provided for the ownership by the city of all the piers and docks in the port already erected or thereafter to be built, and also directed the leasing thereof by the city to one steamship company, so that there would result a total exclusion of all other steamers or ships, it seems to me that the city could acquire no land *in invitum* for the purpose of owning or building piers or docks to be thus let. It would then indeed be the case of an attempt to take private property for private purposes. Such an act would not be a regulation, but, in effect, it would be a wanton attempt at the destruction of our commercial interests and power. There would, in that event, be no fulfillment of a public duty, but, on the contrary, the perpetration of a crime against the public, and the interests of our own citizens.

Neither the state, nor the city as its agent, would be justified, to say the least, in such an arbitrary abuse of its obligations to the civilized and commercial world.

Extreme cases may always be imagined, although they should have but little, if any, legitimate weight in an argument. The act under consideration is not of such a character. The authority to lease or to give the exclusive use of some piers for specified kinds of commerce bears no relation in fact to the kind of legislation just spoken of. The circumstances surrounding the case must be viewed in all aspects. The act plainly contemplates, through all its provisions, the fact that there will always remain under the direct control and possession of the city sufficient piers and docks for the accommodation of all commerce which may seek our port, and which has no special pier or dock leased to the owner of the vessel desiring dock facilities.

Considering the large extent of the property of this description owned and to be owned by the city, together with the fact that there is no absolute direction to the city to lease the smallest portion thereof to any one, we become at once convinced that the leasing which will be actually carried on

under this mere permission will amount to no more than a special regulation of the manner in which a comparatively small portion of the whole property of this nature owned by the city shall be used for the legitimate ends of commerce.

This mere permission to use property by leasing it to others, when the whole surrounding circumstances are examined, cannot be regarded as providing for its private use.

When used by lessees under the facts already stated, the use is a public one. The use is public while the property is thus leased, because it fills an undisputed necessity existing in regard to these common carriers by water, who are themselves engaged in fulfilling their obligations to the general public, — obligations which could not otherwise be properly or effectually performed. And in filling the necessity for such accommodations, the city or the state is only performing its public duty.

For these reasons, we are of the opinion that the first objection taken to the granting of the order for the appointment of commissioners is not tenable.

The defendants' second ground of objection is, I think, equally fallacious.

It is claimed that this property has already been devoted to, and is actually occupied for, a public use, and that it is not within the legislative intent, as evidenced by the general statutes upon the subject, that any land thus used should be condemned for dock or pier purposes.

The general rule contended for by the defendant, that property devoted to one public use will not be regarded as subject to the right of condemnation for another public use, unless the statute plainly grants such right, may be admitted to the full extent thus stated. It is not necessary that the statute should, in terms, so enact. A necessary implication arising from language used is quite sufficient in this as in other cases for the purpose of an enactment. There is, however, in this statute, a clear grant in terms of the power to condemn all wharf property in New York City to which the city has no right or title, and also any rights, terms, easements, and privileges pertaining to any wharf property in the city, and not owned by the city: Consolidation Act, sec. 715.

We think this is a sufficient grant of power to include in condemnation proceedings property of the nature described in the statute, even when owned by a railroad or a

gas company, and used by the company for landing freight or other property. The property to be taken need not be necessary for the purpose of building a pier or dock according to the plan adopted by the city officers. The act goes much farther than that, and includes the power to take property of this nature belonging to private individuals, so that the whole wharf property may belong to the city. In building piers, wharves, docks, etc., under and pursuant to the plan adopted by the commissioners of docks, the actual building is to be carried on pursuant to the conditions imposed by section 714 of the consolidation act, without interfering with the rights or property of any other person, excepting as therein stated. Further power is then given by section 715 of the same act, by which private ownership of all property of this nature may be extinguished and converted into ownership by the city. It is not therefore necessary to show that the land proposed to be taken is required in order to carry out the building of any particular pier, or dock, or bulk-head, under the plan already spoken of. It may be required in order to enable the city to carry out its general plan, and to extinguish the title of private parties to certain wharfage property, and to acquire the same for the city, and if so, the statute permits the acquisition for that purpose.

It was said in *Kingsland v. Mayor etc.*, 110 N. Y. 569, that the wharves of private owners were to be purchased under the provisions of this act, or taken in the ordinary manner by proceedings under the right of eminent domain. It is plain that the act contemplated the purchase or condemnation of this kind of property, without reference to the question of the particular owners of the same, whether they were private individuals or corporations. The purpose was to place the ownership of all property of this nature in the city itself, to which the whole power of regulation and government was to be given. We agree with what was said upon this subject by the learned presiding justice who delivered the opinion of the general term in the case of the Consolidated Gas Company, the order in which proceeding is among those herein under review.

As to the third ground of objection, which sets up that there has been no real attempt at an agreement upon the price, and that therefore there is no inability to agree set forth, we can add nothing to what has already been said in the su-

preme court upon that subject, and for the reasons therein expressed, we conclude the objection to be unfounded.

The orders should therefore, in all the proceedings, be affirmed, with costs.

EMINENT DOMAIN. — As to the necessities which will justify the exercise of eminent domain in regard to land already devoted to a public use, see note to *Appeal of Sharon Ry Co.*, 9 Am. St. Rep. 142-144.

BARRETT v. PALMER.

[125 NEW YORK, 326.]

JURISDICTION OF STATE COURT OVER TRESPASS COMMITTED ON LAND CEDED TO UNITED STATES. — Where Congress has made no new regulations touching the administration of justice in civil cases with respect to actions arising within territory which a state has ceded to the federal government for the purpose of a navy-yard, the laws of the state in force at the time of the cession, and the jurisdiction of its courts in regard to private rights and remedies, remain unchanged and unaffected by the act of cession.

TRESPASS. The opinion states the case.

M. L. Towns and Henry C. De Witt, for the appellant.

Hugo Hirsh, for the respondent.

O'BRIEN, J. The plaintiff recovered a verdict against the defendants in an action alleging a trespass. The facts are undisputed, that in February, 1889, the defendant, Palmer, leased to the plaintiff certain booths or market-stands in the Wallabout Market, Brooklyn, for two years, and that the plaintiff had paid to him the rent reserved by the lease up to July, 1889; that in April, 1889, the defendants, acting together without right, took possession of the stands, ejected the plaintiff therefrom, and destroyed or converted to their own use certain fixtures and other property, and have ever since excluded the plaintiff from possession. There can be no doubt that the general jurisdiction of the city court of Brooklyn, where the trial was had, extends to actions of trespass such as this: Code, secs. 263, 3343. The only question raised at the trial that is now open for review would apply to any other state court as well as to the one in which the trial took place. The *locus in quo* was originally a part of the Brooklyn Navy-yard, jurisdiction of which had been ceded to

the United States by chapter 355 of the Laws of 1853. The federal authorities subsequently leased a part of the land acquired under this act to the city of Brooklyn for a market, or at least permitted the city to use it for that purpose. The authorities of the city leased several market stands to the defendant, Palmer, and he sublet some of them to the plaintiff. At the close of the evidence, the counsel for the defendants moved to dismiss the complaint on the ground that the trespass complained of was upon territory or a reservation belonging to the United States, and that the court had no jurisdiction of the action. This motion was denied, and the defendants excepted. The verdict of the jury was \$1,520, and while the general term might very properly have exercised its power to reduce it, we cannot. There was evidence for the consideration of the jury, and under such circumstances this court will not attempt to revise their action.

There can be no doubt that an action of trespass *quare clausum fregit* is local in its character, and the courts in this state have no jurisdiction when such trespass is committed upon lands in another state: *Dodge v. Colby*, 108 N. Y. 445; *Cragin v. Lovell*, 88 N. Y. 258; *American Union Tel. Co. v. Middleton*, 80 N. Y. 408.

The jurisdiction of a superior city court is always presumed (Code, sec. 266), and by subdivision 3 of section 263 of the code, the city court of Brooklyn has jurisdiction of all such actions as this, where the real property is situated within the city, or where the defendant is a resident of the city, or where the summons is personally served upon the defendant therein. It is certain that all these conditions exist in this case. The contention of the learned counsel for the defendant must therefore rest upon the proposition that the state has no power to confer jurisdiction upon its courts to redress injuries of this character when committed upon lands acquired by or ceded to the United States. The power of the federal government to acquire lands within a state for governmental purposes cannot be so exercised as to dismember the state, and separate a part of its territory from its jurisdiction. When the lands are acquired by the exercise of the power of eminent domain, the United States becomes simply an ordinary proprietor, and the jurisdiction and authority of the state over the lands remain unchanged, except so far as their use for the purpose of executing the powers of the general government necessarily remove them from the domain of state au-

thority. But it has been held that the state may cede to the general government political jurisdiction over such lands, and then Congress has the power to legislate in regard to them. We are not disposed to hold that even then the judicial power of the courts of this state would be powerless to redress private injuries committed thereon, or that the injured party would be compelled to seek justice in some other jurisdiction.

The state did cede such political authority to the federal government with respect to the lands in question, with certain reservations. Congress has not, however, made any new regulations touching the administration of justice in civil cases with respect to actions arising therein, and until some such regulations have been made, the municipal law of the state for the protection and enforcement of private rights through the courts remains unchanged: *Chicago etc. R'y Co. v. McGlinn*, 114 U. S. 542; *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525.

The cession of territory by one sovereignty to another does not abrogate the laws in force at the time of the cession for the administration of private justice. Not, at least, until the new sovereignty has abrogated or changed them do such laws cease to operate, except, possibly, so far as they may be in conflict with the political character, institutions, and constitution of the government to which the territory is ceded. Mr. Justice Field, in the supreme court of the United States, in the case of *Chicago etc. R'y Co. v. McGlinn*, 114 U. S. 542, stated the rule of international law on this subject as follows: "It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country—that is, the laws which are intended for the protection of private rights—continue in force until abrogated by the new government or sovereign."

As nothing has been done by Congress to displace the laws of this state, and the jurisdiction of its courts in regard to private rights and remedies with respect to the lands ceded for the purpose of a navy-yard in Brooklyn, these matters remain unaffected by the act of cession.

The judgment should therefore be affirmed.

IN THE CASE OF *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, it was held that a state might cede exclusive jurisdiction to the United States over a tract of land within its limits in a manner not prescribed in the constitu-

tion of the United States, and that it might prescribe any conditions to such cession, not inconsistent with the purposes for which the land was intended. *Chicago etc. Ry Co. v. McGlinn*, 114 U. S. 542, affirms the doctrine of the leading case, that where land is ceded by a state to the United States, the municipal laws of the state continue in force until abrogated by the United States, as to so much as is not used by the United States for its forts, buildings, and other needful purposes. See also *American Ins. Co. v. Carter*, 1 Pet. 511, for a discussion of this subject.

HUDSON RIVER TELEPHONE COMPANY v. WATER- VLIIET TURNPIKE AND RAILWAY COMPANY.

[135 NEW YORK, 303.]

IMMUNITY FROM LIABILITY OF CORPORATION DOES NOT EXTEND TO ACTS ULTRA VIRES. — The immunity from liability of a corporation exercising a delegated authority for the public benefit for a private injury, where the damage sustained is the result of the proper exercise of the power or privilege conferred by law, does not extend to acts that are *ultra vires*, or that are equivalent to a confiscation or condemnation of property rights of the citizen, unless provision is made for due compensation.

ELECTRICITY AS MOTIVE POWER FOR STREET-CARS, AUTHORITY OF COMPANY TO ADOPT. — Where a statute, enacted before the introduction of electricity as a propelling force, authorizes a corporation to construct a street-railroad, and to operate it by any mechanical or other power except steam, such company has authority, upon obtaining the consent of the proper municipal authorities, to adopt electricity as a motive power, and to place in the streets the apparatus and fixtures necessary for its practical and efficient use. Such statute is not to be limited to such methods of operating street-railroads as were known and in actual use at the time of its passage; for its language, literally construed, includes undiscovered as well as existing modes of operation. Nor is the company irrevocably bound by the choice of motive power first made by it after the enactment of the statute.

TELEPHONE, TRANSMISSION OF MESSAGES BY, AUTHORIZED BY STATUTE FOR INCORPORATION OF TELEGRAPH COMPANY. — The form of transmitting messages by telephone, through the medium of an electric current passing over extended wires, is authorized by a statute for the incorporation of telegraph companies, although when the act was passed such form of communication was unknown.

MUNICIPAL CORPORATION, RIGHT OF, TO IMPOSE RESTRICTIONS ON FRANCHISE OF STREET-RAILWAY COMPANY. — Where a street-railway company is authorized by the statute under which it was built and operated to select and adopt a new method of propelling its cars, the municipal corporation, having the right to regulate the use of the streets over which the cars of the company run, has the power to impose such reasonable conditions upon the company's enjoyment of its franchise as in their judgment the interests of the public seem to require. Their authority in this respect is coincident in extent with the company's right of selection.

STREET SURFACE RAILROAD ACT NOT APPLICABLE TO ROAD CHANGED FROM HORSE TO ELECTRIC MOTIVE POWER. — A street-railway company having the right, under the statute authorizing it to build and operate its road, to change its motive power from horse-power to electricity is not subject to the provisions of the street surface railroad act, requiring the approval of the railroad commissioners and the consent of the owners of one half in value of the property abutting on the streets, since it comes within the saving clause in that act, which declares that the act shall not interfere with, repeal, or invalidate any rights theretofore acquired, and inchoate as well as perfected rights are saved by that provision.

STREET, APPROPRIATION OF, TO PURPOSE OTHER THAN PUBLIC PASSAGE, SUBORDINATE. — Since the primary and dominant purpose of a street is for public passage, any appropriation of it by legislative sanction to other objects must be deemed to be in subordination to this use, unless a contrary intent is clearly expressed. And therefore the inconvenience or loss which others may suffer from the adoption of a mode of locomotion authorized by law, which is carefully and skillfully employed, and which does not destroy or impair the usefulness of a street as a public way, is not sufficient cause for a recovery, unless there is some statute which makes it actionable.

TELEPHONE COMPANY NOT ENTITLED TO RESTRAIN STREET-RAILWAY COMPANY FROM PROPELLING CARS BY ELECTRICITY. — A telephone company operating its lines under a franchise granted and accepted upon the express condition that the maintenance of its lines shall not prevent the adoption of any safe, convenient, and expeditious mode of travel is not entitled to an injunction to restrain a street-railway company from operating its road by the single-trolley system of electrical propulsion, a system found to be the best yet devised, and neither prejudicial to public health nor dangerous to human life, since the former company is not using the streets for any of the purposes to which they have been dedicated as public highways, while the latter company is occupying them in such a manner as to expedite public travel and promote the public use to which they were originally devoted.

RIGHT OF PASSAGE THROUGH STREETS, FORM IN WHICH SHALL BE ENJOYED CANNOT BE QUESTIONED WHEN. — Where a telephone company has, by the manner in which it has elected to use its franchise, accorded to the public the unrestricted right of passage through the public streets, it cannot question the form in which such right shall be enjoyed, so long as it is of lawful origin and is utilized with proper care and skill.

MOTION FOR EXTRA ALLOWANCE OF COSTS, DUTY OF COURT TO DISPOSE OF. — Where, in an action for an injunction, the defendant makes a motion for an extra allowance of costs, if the right sought to be enjoined has a money value, and there is any evidence to establish such value, the court has jurisdiction to entertain the motion, and it is its duty to exercise its discretion, and dispose of the motion upon its merits.

ACTION by the plaintiff to restrain the defendant from operating its street-railroad by means of an electric motor, on the ground that it will cause great and irreparable injury to plaintiff's telephone system and service. Plaintiff was incorporated in 1883, under the act of 1848. The defendant was in-

incorporated in 1828 as a turnpike company. In 1862, it was authorized by an act of the legislature to construct and maintain railroad tracks on its turnpike road, and to extend the same through the villages of West Troy and Cohoes, the town of Watervliet, and into the city of Albany, and with the consent of and under such restrictions as might be deemed proper by the common council of the city to extend and maintain its tracks through Broadway, in said city, to the south ferry, and to operate its road by "any mechanical or other power . . . which the said company may choose to employ." The consent was obtained and defendant's track laid, and the road operated by horse-power until 1889. In June, 1889, the common council of the city gave the defendant permission to use the single-trolley system of electric propulsion, and, prior to the commencement of this action, it had fitted up its road for operation by that system. The defendant necessarily used a powerful current of electricity, some of which escaped and passed through the earth and other conductors, and affected the plaintiff's lines, frequently rendering their use difficult and unsatisfactory, and many times impossible. Other facts appear from the opinion.

John S. Wise and Marcus T. Hun, for the appellant.

Edwin A. Countryman and John A. Delehanty, for the respondent.

MAYNARD, J. All the injuries of which the plaintiff complains are due to the adoption by the defendant of the single-trolley system of electric propulsion. It becomes, therefore, of the first importance to determine whether this change of motive power was authorized by law. The plaintiff makes a vigorous attack upon the right of the railway company to the enjoyment of such a franchise, and urges many grounds in support of its position. We cannot assent to the argument of the learned counsel for the defendant that the determination of this question is immaterial, because the state alone, by its attorney-general, can bring suit for a usurpation of corporate powers, or because ordinarily the local authorities must prosecute for an unlawful obstruction of the streets not involving the appropriation of private property. In the case of a corporation exercising a delegated authority for the public benefit, the actionable quality of a private injury resulting therefrom may depend upon the legislative will, and the aggrieved party

may be without remedy if the damage sustained is the result of the proper exercise of a power or privilege conferred by law, and a right of action is not given by express enactment. This immunity from liability does not, however, extend to acts which are *ultra vires*, or which are equivalent to a confiscation or condemnation of the property rights of the citizen, unless provision is made for due compensation. If the sovereign power has never granted to the defendant the right to make use of electricity in the traction of its cars in the streets of Albany, it must respond to the plaintiff and to all others whose lawful pursuits are invaded by its illegal procedure.

But we think it is clear that under the act of 1862, chapter 233, and the ordinances of the common council of the city, the defendant was invested with the authority to adopt this method of transportation, and to place in the streets in question the apparatus and fixtures necessary for its practical and efficient use. The choice of a motive power is not expressly limited in the statute, except by the exclusion of the force of steam. It is not impliedly limited, except that the power selected must not be of such a kind or require such a mode of application as will make it a public nuisance, or render the passage of the streets unsafe or dangerous for travelers availing themselves of the ordinary means of locomotion.

The report of the referee removes all doubt with reference to the safety and practical usefulness of the system adopted by the defendant. He finds, in substance, that it is the most efficient and economical, and the best thus far devised, and less liable to accidents, through the displacement of machinery, than any other trolley system; that it subserves the public interests and satisfies the public wants with respect to transportation; that it is not prejudicial to the public health or dangerous to human life; and that no other system of electric propulsion of cars has thus far been demonstrated to be as practicable, effective, and advantageous, both to the public and to private interests, as the overhead, single-trolley system.

As the evidence is not contained in the record, these findings must be deemed to have been supported by competent proofs, and they leave no room for the contention that the use of this system is unsafe, or dangerous, or in any degree a public nuisance.

The act of 1862 cannot properly be limited to such methods of operating street surface railways in cities as had then been invented and were then in actual use. The words of the stat-

ute are to be interpreted according to their natural and obvious meaning, and as the terms employed are not ambiguous, extrinsic facts are not available to restrict the authority which it plainly confers. The language, literally construed, includes undiscovered as well as existing modes of operation. Electricity, as a natural and applied force, was then well known, and it is reasonable to infer that its adaptation as a propelling power was even then anticipated. It would be an unjust reflection upon the wisdom and intelligence of the law-making body to assume that they intended to confine the scope of their legislation to the present, and to exclude all consideration for the developments of the future. If any presumption is to be indulged in, it is that general legislative enactments are mindful of the growth and increasing needs of society, and they should be construed to encourage, rather than to embarrass, the inventive and progressive tendency of the people. The application by the defendant for this new grant of power must have reminded the legislature that in thirty years its original franchise of a turnpike way had proved inadequate for the wants of a thickly populous community, and it could not have failed to perceive that in a like period of time the operation of street-cars by horse-power might become obsolete or undesirable. It therefore wisely provided for the occurrence of such an emergency.

It is not to be denied that it is a sound rule of statutory construction which permits nothing to be taken in a grant of corporate powers that is not plainly expressed, or unequivocally given, or not demanded by necessary implication. The defendant claims nothing more; but the plaintiff endeavors to cut down the franchise bestowed, by eliminating from the statute the general words of the grant. As in 1862 these railways were run exclusively by animal-power, the provision in section 4 of the act which authorizes the defendant to adopt any mechanical or other power, or the combination of them, which it might choose to employ, except steam, was superfluous, if its range of selection is to be confined to the motive forces which had then been discovered and employed. The history of plaintiff's franchise is instructive upon this point. It is an intruder in the public streets, and not possessed of any property rights which a court of equity can be invoked to protect, if the canon of construction which it insists upon applying to the grant of the defendant's franchises shall be allowed to prevail. It is incorporated under the act of 1848,

chapter 265, providing for the formation of telegraph companies. At that time, and for twenty years afterwards, the art of telegraphy, as known and practiced, did not include the transmission of human speech by means of the telephone over wires strung upon poles. But it has been held in other states and countries, and as we think rightly, that this form of transmitting messages through the medium of an electric current passing over extended wires is authorized by a statute for the incorporation of telegraph companies, although when the act was passed such form of communication was unknown: *Wisconsin Telephone Co. v. Oshkosh*, 62 Wis. 32; *Cumberland Telephone etc. Co. v. United Electric R'y Co.*, 42 Fed. Rep. 273; *Attorney-General v. Edison Telephone Co.*, L. R. 6 Q. B. D. 244.

It would also be a narrow and illiberal construction of the statute to hold that the defendant was irrevocably bound by the choice of a motive power made in 1862. It then selected the only practicable one, but the authority to employ others was not thereby exhausted. It was a continuing privilege, and was intended to be potential whenever and as often as the means of public travel might be improved or facilitated by its exercise. Equally flexible was the power given to the common council of the city to impose such reasonable conditions upon the enjoyment by the defendant of the franchises of a street-railway company as, in their judgment, the interests of the public seemed to require. Their authority, in this respect, was coincident in extent with the company's right of selection. They could limit the municipal assent to a railroad operated in a specified way, as they did by the ordinance of 1862, and while that remained unmodified, no other method could be lawfully used, and they could, by a subsequent ordinance, as in 1889, authorize the necessary changes to be made in the equipment of the streets for the introduction of electricity as a propelling force. This power is fairly inferable from the original act, and may also perhaps be deduced from the provisions of the city charter, which authorize them to regulate the use of the streets by railways.

This case is clearly distinguishable from that of *People v. Newton*, 112 N. Y. 396, cited at length by plaintiff's counsel. There the railroad company had no express grant of legislative authority, and the consent of the municipality was refused. It attempted to override the local authorities, and compel them by *mandamus* to give their approval to the opening and excavation of the streets for the purpose of sub-

stituting a subsurface mode of operation, when the granting of the permission plainly involved the exercise of judgment and discretion. It was held that under such circumstances the department of public works could not be coerced to act favorably upon the company's application. But the case is not authority for the broad proposition for which the plaintiff contends, that where the right to select a motive power is expressly given, and is not limited either as to time or kind, and a selection has been made with the approval of the city authorities, the company cannot subsequently adopt a new and better system of propulsion upon obtaining the municipal consent thereto.

The defendant was not subject to the provisions of section 12 of the street surface railroad act of 1884, chapter 252, as amended by chapter 531 of the Laws of 1889, requiring the approval of the railroad commissioners and the consent of the owners of one half in value of the property abutting upon the streets.

It had the right to make the change, under the act of 1862, upon obtaining the consent of the common council, and hence it is embraced within the saving clause contained in section 18, which declares that the act of 1884 shall not interfere with, repeal, or invalidate any rights theretofore acquired under the laws of the state by any horse-railroad company, or affect or repeal any right of an existing street surface railroad company to construct, extend, operate, and maintain its road in accordance with the terms and provisions of its charter and the acts amendatory thereof. Inchoate as well as perfected rights are saved by such a provision: *New York Cable Co. v. Mayor etc.*, 104 N. Y. 1.

The defendant's authority to use electric motors in the propulsion of its cars in the streets of Albany, and to operate them by the single-trolley system, cannot therefore be successfully questioned, and unless some actionable damage has resulted, or will result, to the plaintiff therefrom, its complaint was properly dismissed by the trial court.

There is no question of prior equities involved. It is a matter of strict legal right. Neither priority of grant nor priority of occupation can avail either party. The plaintiff has a franchise which is entitled to protection, but the prime difficulty it encounters grows out of its subordinate character. It has been given and accepted upon the express condition that it shall not obstruct or interfere with the enjoyment, by the

defendant, of its franchises. The plaintiff is not using the streets for one of the purposes to which they have been dedicated as public highways, while the defendant is occupying them in such a manner as to expedite public travel, and promote the public use to which they were originally devoted. The condition contained in the plaintiff's grant would have been implied had it not been expressly named.

The primary and dominant purpose of a street is for public passage, and any appropriation of it by legislative sanction to other objects must be deemed to be in subordination to this use, unless a contrary intent is clearly expressed. The inconvenience or loss which others may suffer from the adoption of a mode of locomotion authorized by law, which is carefully and skillfully employed, and which does not destroy or impair the usefulness of a street as a public way, is not sufficient cause for a recovery, unless there is some statute which makes it actionable. A different rule prevails if there has been an encroachment upon private rights to the extent of an appropriation of private property, and it was upon this ground that the decision in the elevated railroad cases was placed: *Story v. New York El. R. R. Co.*, 90 N. Y. 122; 43 Am. Rep. 146; *Lahr v. Metropolitan El. R. R. Co.*, 104 N. Y. 268. It was there held that an abutting owner has an easement of light, air, and access in the street in front of his premises, of which he cannot be lawfully deprived without compensation, by the erection and use of an elevated railway structure.

But the plaintiff has no easement in the public streets. It is there by virtue of a legislative grant, revocable at the pleasure of the power which made it, constituting, while it continues, a valuable franchise, which is recognized as property in the fullest sense of the term: *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684. The plaintiff's title to this property is, however, encumbered by a condition which diminishes its value, and it cannot rightfully complain of the burden which it has voluntarily assumed. It is a part of its compact with the state that the maintenance of its lines of communication shall not prevent the adoption by the public of any safe, convenient, and expeditious mode of transit, such as the defendant's system has been shown to be. It is not deprived of any property right, but is simply compelled to yield the subservience which it is bound to render under the charter which gave it existence.

These considerations necessarily dispose of one of the grounds

upon which the plaintiff claims to be entitled to relief from the special injury sustained by the acts of the defendant, namely, the derangement of the electric currents upon its lines of wire by means of induction, as it is called, in electrical dynamics.

It seems to be indispensable to the successful prosecution of the plaintiff's business, that it should make use of an exceedingly weak and sensitive current of electricity. By a law of electric force, not clearly defined or understood, the transmission of a powerful current, such as the defendant must use to supply motion to its cars, along a line of wire parallel with and in close proximity to the plaintiff's wires, induces upon the latter an additional current, which renders the operation of the plaintiff's telephones at all times difficult, and sometimes impracticable. It is found that this disturbance cannot be avoided by the defendant without a complete change of the system adopted, and the use of motors which are more expensive, more dangerous, and less useful and efficient. It is obvious, that to require such change to be made would be to grant to the plaintiff, by a decree of the court, that which the legislature has expressly and intentionally withheld. But the plaintiff is exposed to another danger which deserves consideration. Its system of communication is only partially established in the public streets. Its telephones are located upon the premises of its subscribers and patrons, and at a central exchange, which is upon private property. Its instruments are connected by branch wires with the main wires suspended upon the poles in the streets. To render their respective plants available, both parties must have a return electric current, and both use the earth for that purpose. The plaintiff grounds its wires upon private property, and in many cases connects them with the gas and water pipes, and in this way establishes and completes its required circuit.

It is immaterial whether its wires are grounded upon its own property, or that of others who permit the plaintiff to so use their premises. Its possession as a licensee would be lawful while the license continues. The defendant allows the electric current used for the movement of its cars to escape or discharge, at least in part, directly from the rails into the ground, from whence it spreads or flows, by reason of the conductivity of the earth, upon plaintiff's grounded wires, and the most serious loss which the plaintiff sustains results from this cause, which is scientifically known as conduction. The

defendant insists that it has an equal right with plaintiff to make use of this property, or law of nature, in the conduct of its business, just as all are entitled to the common use of the air and the light of the heavens, which, in a certain sense, is undoubtedly true. But the defendant does something more. It does not leave the natural forces of matter free to act unaffected by any interference on its part. It generates and accumulates electricity in large and turbulent quantities, and then allows it to escape upon the premises occupied by the plaintiff, to its damage.

We are not prepared to hold that a person, even in the prosecution of a lawful trade or business, upon his own land, can gather there by artificial means a natural element like electricity, and discharge it in such a volume that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force and to such an extent as to break up his business, or impair the value of his property, and not be held responsible for the resulting injury. The possibilities of the manifold industrial and commercial uses to which electricity may eventually be adapted, and which are even now foreshadowed by the achievements of science, are so great as to lead us to hesitate before declaring an exemption from liability in such a case. It is difficult to see how responsibility is diminished or avoided, because the actor is aided in the accomplishment of the result by a natural law. It is not the operation of the law to which the plaintiff objects, but the projection upon its premises, by unnatural and artificial causes, of an electric current in such a manner and with such intensity as to materially injure its property. It cannot be questioned that one has the right to accumulate water upon his own real property and use it for a motive power; but he cannot discharge it there in such quantities that, by the action of physical forces, it will inundate his neighbor's lands and destroy his property, and shield himself from liability by the plea that it was not his act, but an inexorable law of nature, that caused the damage. Except where the franchise is to be exercised for the benefit of the public, the corporate character of the aggressor can make no difference. The legislative authority is required to enable it to do business in its corporate form, but such authority carries with it no lawful right to do an act which would be a trespass if done by a private person conducting a like business. If either collects, for pleasure or profit, the subtle and impercep-

tible electric fluid, there would seem to be no great hardship in imposing upon it, or him, the same duty which is exacted of the owner of the accumulated water-power,—that of providing an artificial conduit for the artificial product, if necessary to prevent injury to others.

But the record before us does not require a determination of the question in this form. The use which the plaintiff is making of its grounded wires is a part of its system of telephonic communication through the public streets, and a necessary component of the service it maintains there under the permission of the state, and is subject to the condition that it shall not incommode the use of the streets by the public. It is one indivisible franchise, and is in its entirety subservient to the lawful uses which may be made of these thoroughfares for public travel. In this respect no distinction can be made between the injuries resulting from induction and conduction.

In the disposition of this appeal there has been no occasion to make any application of the rule that where a public use authorized by law takes no property of the individual, but merely affects him by proximity, the necessary interference in his business or in the enjoyment of his property occasioned by such use furnishes no basis for damages: *Radcliff's Ex'rs v. Mayor etc.*, 4 N. Y. 195; 53 Am. Dec. 357; *Bellinger v. New York Cent. R. R. Co.*, 23 N. Y. 42; *Moyor v. New York etc. R. R. Co.*, 88 N. Y. 351; *Uline v. New York etc. R. R. Co.*, 101 N. Y. 98; 54 Am. Rep. 661; *American Bank Note Co. v. New York etc. R. R. Co.*, 129 N. Y. 252. Under such a rule it would be a grave question whether the injuries to which the plaintiff was subjected would not, if made permanent, constitute a servitude upon its property which could not be imposed without compensation, provided the parties were occupying the streets upon an equal footing. As was said by Judge Andrews in *Cogswell v. New York etc. R. R. Co.*, 103 N. Y. 14, 57 Am. Rep. 701: "It is, in many cases, difficult to draw the line, and to determine whether a particular use is consistent with the duties and burdens arising from vicinage, or whether it inflicts an injury for which the law affords a remedy."

We are spared the task of discrimination in this case by reason of the legal attitude which the plaintiff has assumed in its occupation of the streets. It has accorded to the public, by the manner in which it has elected to use its franchise, the unrestricted right of passage, and it cannot question the form in which such right shall be enjoyed, so long as it is of

lawful origin and is utilized with proper care and skill. The defendant's mode of conveyance of passengers is of this character, and the plaintiff can no more justly complain of its loss from this source than it could if, by the jarring of loaded vehicles passing up and down Broadway, its delicate and sensitive instruments were displaced and their beneficial use impaired or destroyed.

There is also an appeal by the defendant from an order denying a motion for an extra allowance of costs. The decision of the court below was placed upon the ground of a want of power, and the special reason assigned was, "that the action being to restrain the defendant from employing a particular system only, and over a part only of the road, the franchise was not involved, and there is, therefore, no basis on which an allowance can be estimated."

In denying the motion for this sole cause we think the supreme court erred. The subject-matter of the controversy litigated was the right of the defendant to use the single-trolley system in the operation of its road upon Broadway and South Ferry Street, and the prayer for relief in the complaint is, that an injunction issue "restraining the defendant from operating its said railroad through the city of Albany by the electric system herein described." If the right thus sought to be perpetually enjoined has a money value, and there was any evidence in the moving papers tending to establish such value, the court had jurisdiction to entertain the motion, and it was its duty to exercise its discretion, and dispose of the application upon its merits. We have examined the record sufficiently to satisfy us that there was some proof of this character.

One witness testifies that the right of the defendant to run its cars by electric motors upon the single-trolley system in the city of Albany is worth to the company the sum of at least three hundred thousand dollars, and as against the double-trolley system, or any other known system, at least seventy-six thousand dollars. We are not permitted to say how much this and other similar evidence may be worth. We are dealing exclusively with a question of power. Whether there shall be any allowance at all, or what the amount of it shall be, and how far the hardships of the plaintiff's situation shall affect the allowance, if at all, are questions primarily to be considered by the special term, and can be safely intrusted to its determination. The authorities cited in the

opinion of the general term were all cases where no evidence was presented as to the commercial value of the right or franchise in question, and the decision was, that in the absence of such evidence it could not be presumed to have a particular value. The just inference from them is, that if such proofs had been submitted the court might have considered them as the basis of an allowance: *People v. Genesee Valley Canal R. R. Co.*, 95 N. Y. 666; *Conaughty v. Saratoga Co. Bank*, 92 N. Y. 401; *Heilman v. Lazarus*, 12 Abb. N. C. 19.

The order of the general term granting a new trial must be reversed, and the judgment entered upon the report of the referee affirmed, with costs in all courts.

The order denying the motion for an additional allowance should be reversed, with costs, and the motion remitted to the supreme court to be there heard upon its merits.

CORPORATIONS, LIABILITY OF, FOR ACTS DONE ULTRA VIRES: *Thames v. Belvidere etc. R. R. Co.*, 26 N. J. L. 148; 69 Am. Dec. 565.

STREET-RAILWAY COMPANIES. — POWER TO ADOPT IMPROVED APPLIANCES: *Boston etc. Ry Co. v. Boston*, 133 Pa. St. 505; 19 Am. St. Rep. 658.

TELEPHONES ARE CLASSED WITH TELEGRAPHS, FOR WHAT PURPOSES: See note to *Central Union Telephone Co. v. Falley*, 10 Am. St. Rep. 128, 129.

POWER OF MUNICIPAL CORPORATION TO REGULATE THE USE OF STREETS: See cases cited in the note to *Wood v. Mears*, 74 Am. Dec. 229.

TELEPHONE COMPANIES, RIGHTS OF, TO USE OF STREETS: *Cincinnati etc. Ry Co. v. Telegraph Ass'n*, 48 Ohio St. 390; 29 Am. St. Rep. 559.

PEOPLE v. CROSS.

[125 NEW YORK, 536.]

EXTRADITED FUGITIVE TRIABLE FOR CRIME OTHER THAN THAT NAMED IN WARRANT WHEN. — A fugitive from justice, surrendered to the authorities of this state upon their demand, pursuant to the constitution and laws of the United States, by the governor of another state, may be held and tried here for a crime other than that charged in the warrant by virtue of which he was arrested and surrendered in the state to which he had fled, when the criminal act for which he was extradited and that for which he is indicted and held is the same.

OBLIGATION OF STATES OF UNION TO EXTRADITE NOT FOUNDED ON COMITY OR TREATY, BUT ON FEDERAL CONSTITUTION. — The obligation of the states of the Union to surrender to each other persons charged with crime is not founded upon comity or treaty, but upon the provisions of the federal constitution, and is not limited to specific offenses, but embraces all crimes. The constitution contains no express condition that the state to which a fugitive is surrendered cannot try him for any

other offense than that charged in the warrant of extradition, and no such condition can be implied. Where, therefore, in *habeas corpus* proceedings, it appears that the relator has been extradited from the state of Wisconsin upon a requisition of the governor of this state, stating that the relator stood charged with grand larceny, and that after his return to this state the indictment for grand larceny was quashed, and he was held upon an indictment for robbery in the first degree, both indictments being based upon the same acts, no principle of comity between the states, nor any legal right secured to the relator, is violated by his detention.

HABEAS CORPUS. The opinion states the case.

John H. Gleason, for the appellant.

James W. Eaton, district attorney, for the respondent.

O'BRIEN, J. The relator, George W. Post, in his petition, alleges that he is unlawfully restrained of his liberty, and imprisoned in the county jail of the county of Albany by the sheriff. Upon his application, a writ of *habeas corpus* was issued to inquire into the cause of the imprisonment, and having been served upon the sheriff in whose custody the relator was, a return was made thereto, in substance, that the relator was held by him in custody, as such sheriff, by virtue of a bench-warrant issued and delivered to him by the district attorney of the county of Albany, upon an indictment duly found in the court of oyer and terminer, whereby the relator was charged with the crime of robbery in the first degree. To this return the relator answered, denying that the imprisonment was legal, as alleged by the sheriff, and also set forth the following facts as constituting the true cause of the detention; that in February, 1889, the relator was indicted in the court of sessions of Albany County for the crime of grand larceny in the first degree; that afterwards, and in October, 1891, when the relator was a resident and inhabitant of the state of Wisconsin, and sojourning therein, he was arrested upon a warrant issued by the governor of that state, upon the requisition of the governor of New York, in which requisition it was stated that the relator stood charged, upon an indictment in the state of New York, with the crime of grand larceny in the first degree, committed in the county of Albany, and that the relator had fled from the state having jurisdiction of the crime charged, and had taken refuge in the state of Wisconsin, and demanding the return of the relator, pursuant to the constitution and laws of the United States; that after such arrest, upon the warrant of the governor of Wisconsin, the re-

lator was delivered to an agent, appointed by the governor of New York for that purpose, and conveyed to Albany for trial upon the indictment; that afterwards he was arraigned upon the indictment and pleaded not guilty, and committed to the custody of the sheriff, by whom he was held and imprisoned till about the 21st of April, 1892, when the indictment for grand larceny in the first degree, upon which the relator was arrested in Wisconsin, was set aside and quashed; that on the same day, the district attorney issued a bench-warrant to the sheriff upon the indictment for robbery, which was found subsequent to his extradition from Wisconsin, and that by virtue of that warrant alone the relator was detained in custody at the time of his application for the writ of *habeas corpus*. The district attorney admitted the facts stated in the answer or traverse of the relator to the return, except some immaterial allegations with reference to the first indictment, and upon what was virtually a demurrer to the relator's traverse, the question was submitted to the judge before whom the writ was made returnable, who dismissed it, and denied the prayer of the petitioner, and remanded him to the custody of the sheriff. This order has been affirmed at the general term. It was admitted in the courts below, and is here, that the relator is held in custody for the same criminal act which constituted the ground of the requisition by the governor of this state upon the governor of Wisconsin, and of his extradition from that state. In the warrant of the governor of Wisconsin, and in the requisition of the governor of this state, that act was designated as grand larceny in the first degree, while in the indictment and warrant under which the relator was held when he applied for the writ of *habeas corpus* it was designated as the crime of robbery in the first degree, and the question is, whether a fugitive from justice, surrendered to the authorities of this state upon their demand, pursuant to the constitution and laws of the United States, by the governor of another state, can be held or tried here for any other crime than that charged in the warrant by virtue of which he was arrested and surrendered in the state to which he had fled, although the act for which he was extradited and that for which he is now indicted and held in this state is the same. The obligation of independent nations to surrender fugitives from justice to each other when demanded rests either upon international comity or the stipulations of express treaty. When upon the former, there is and can be no general rule as to the duty of

the government upon which the demand is made, save its own sense of justice and regard for what is due to its neighbors. When upon the latter, the obligation is discharged by the surrender of persons properly charged with the specific offenses provided for in the treaty. Whether fugitives from justice extradited from foreign countries for offenses against the United States or any of the states could be tried when brought within the proper jurisdiction for any offense except that charged in the papers upon which the accused was surrendered by the foreign government was, until quite recently, a question that produced much conflict of judicial authority. The supreme court of the United States has settled the question, so far as concerns the obligations due to foreign nations, or to persons surrendered by them, upon the demand of the federal government pursuant to treaty stipulations: *United States v. Rauscher*, 119 U. S. 407.

In that case it appeared that Rauscher was surrendered by the government of Great Britain to the United States, upon its demand, for murder committed upon the high seas, an offense of which its courts had jurisdiction, and that he was subsequently tried and convicted of another and minor offense, namely, the cruel and inhuman punishment of the same seaman, and thus the act for which he was extradited and tried was the same.

It is urged by the learned counsel for the relator that this is a controlling authority in the case at bar. But we think that there is a material distinction between the facts and circumstances of that case and those disclosed by the record before us. It must be noted in the first place that much stress was laid in that decision, and very properly, upon the fact that, by the act of Congress relating to extradition from foreign nations upon the application of the federal government, it is expressly provided that the person surrendered shall not, when brought to this country, be tried for any other or different offense. This is the construction given to the act in the case last cited: 119 U. S. 443; U. S. Rev. Stats., sec. 5275. The act of Congress passed in pursuance of the federal constitution is the supreme law of the land, and this law protected Rauscher from trial for any other offense than the one upon which he was surrendered to this government by the British authorities. Moreover, the laws of Great Britain, from which jurisdiction the fugitive had been extradited, forbid the surrender, by that government, of persons charged with crime in other jurisdic-

tions, to countries under whose laws the person demanded was liable to be tried for some other or different offense than that charged in the application for extradition: 33 & 34 Vict., c. 52; *Adriance v. Lagrave*, 59 N. Y. 115; 17 Am. Rep. 317. And therefore when the United States took the fugitive from the protection of those laws, its faith and honor was pledged, at least impliedly, to the effect that it would not permit its courts to try him for any other offense, even though it might be of a lesser grade than that upon which he was surrendered. Furthermore, the offense for which Rauscher was actually tried was not one which Great Britain had bound itself by the terms of the treaty with this country to surrender him. It may very well be that had he been charged in the application for extradition with only the offense for which he was tried, that the government within whose jurisdiction he was found would have refused to surrender him to the authorities of the United States. It would therefore seem to be clear that his trial for another offense was in violation of the faith and honor of the government, as well as of an express law of Congress. These considerations are not applicable to the case now before us. The obligations of the states of this Union to surrender to each other persons charged with crime is not founded upon comity or treaty, but upon the plain provisions of the federal constitution, found in article 4, section 2, as follows: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he has fled, be delivered up to be removed to the state having jurisdiction of the crime." The obligation thus imposed upon the states is not, like treaties between independent nations, limited to specific offenses, but embraces all crimes, and if the demanding state, when the fugitive is surrendered to it, cannot try him for any other offense than that charged in the warrant of extradition, that is a condition that must be implied, as it is not expressed in the instrument creating the obligation. Whether a fugitive from justice can be tried in the state from which he has fled, and to which he has been surrendered, for any other offense than that charged in the application to the governor of the surrendering state, is a question upon which much conflict of authority is to be found in the courts of the several states, and in the inferior courts of the United States, as the federal supreme court has not yet, so far as I am informed, passed upon the

point. We are asked in this case to hold that the rule must be the same in cases of interstate and international extradition, and that the principles which control the latter have been announced in the *Rauscher* case. We are not prepared to hold that the doctrine of that case is necessarily applicable to this. There were reasons for that decision that do not exist in this case, some of which we have already pointed out. It may be proper to add, also, that the act of Congress regulating interstate extradition does not provide that the fugitive surrendered shall be exempt from trial upon any other charge, while that regulating international extradition does, according to the construction given to it by the highest federal court, as we have seen: U. S. Rev. Stats., secs. 5278, 5279; *United States v. Rauscher*, 119 U. S. 407.

It was competent for Congress to insert the same or a similar provision in the statute regulating extradition between the states as that regulating extradition from foreign nations, but it is somewhat significant that it has not done so. The states, though sovereign and supreme in their domestic affairs, and as to all matters not conferred by the constitution of the United States upon the federal government, bear relations to each other with respect to the question now under consideration somewhat different from that of foreign and independent nations. Possibly it would be competent for the states to enact that persons charged with crime in other states should not be taken from the jurisdiction where they are found, unless by the law of the demanding state they are not liable to be put upon trial for any other offense than that charged in the demand for his surrender. But I am not aware that any of the states have enacted such regulations. On the contrary, the highest court of Wisconsin, the state from which the relator was demanded and received, has held that a fugitive from justice, surrendered to another state upon demand, under the constitution, may be tried in the state from which he fled, for any other offense of which its courts may have jurisdiction: *State v. Stewart*, 60 Wis. 587; 50 Am. Rep. 388; *Adrianse v. Lagrave*, 59 N. Y. 115; 17 Am. Rep. 317.

As this is the law of that state, it is difficult to see how any rule of comity has been disregarded by reason of what has been done in the case at bar. We do not think it necessary in this case to decide the question as to whether there is a distinction to be observed in cases of interstate and international

extradition with respect to the trial of the person extradited for another and different offense. We think that as the charge upon which the relator is now held, though designated as robbery, is based upon the identical act for which he was surrendered by the governor of Wisconsin, and then designated as grand larceny, that no principle of comity between the states, nor any legal right secured to the relator, has been violated.

For these reasons, the order appealed from should be affirmed.

EXTRADITION. — RIGHT TO TRY EXTRADITED PERSONS FOR OTHER OFFENSES: *State v. Hall*, 40 Kan. 338; 10 Am. St. Rep. 200; *Ex parte McKnight*, 48 Ohio St. 538; *State v. Stewart*, 60 Wis. 587; 50 Am. Rep. 338. For a full discussion of this subject, see extended notes to *State v. Hall*, 10 Am. St. Rep. 207, and *Matter of Fetter*, 57 Am. Dec. 400.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA

GREGORY v. LAYTON.

[36 SOUTH CAROLINA, 52.]

DAMAGES RESULTING FROM ACTS DONE ON ADJACENT LAND, LIABILITY FOR.

One owner of land is not liable to his neighbor for damages resulting to the latter's land from acts done by the former upon his own land, unless the acts are negligently done, or the damages are the natural and probable consequences of such acts. He is not responsible for all possible consequences that may result from his lawful acts done on his own land.

ACTION to recover damages for injuries to land. The circuit judge charged the jury that, as matter of law, the plaintiff was not entitled to damages on account of the fire alleged in the first cause of action to have been carelessly and negligently used on the defendant's premises, because there was no proof of negligence on the part of the defendant, the testimony being that his servants set fire to some bushes and briars on his land while the weather was quiet, but some hours after, while the bushes and briars were burning, a wind arose which carried the fire upon the plaintiff's land, although the defendant's servants exerted themselves to prevent its spread. In reference to the second cause of action, he charged that if the injury to the plaintiff's land was the natural consequence of the acts done by the defendant upon his land, the defendant would be responsible in damages to the extent of the injury.

D. A. Townsend, for the appellant.

William Munro, contra.

McIVER, C. J. The complaint in this case sets forth two causes of action; one that "the defendant so carelessly and negligently used fire on his own premises, and employed servants who so carelessly and negligently used fire on his premises, that said fire reached the land and premises of the plaintiff," thereby causing the injuries for which damages are claimed; the other that "the defendant injured and damaged the land of the plaintiff to the amount of five hundred dollars, by wrongfully and unlawfully stopping up a ditch, and by erecting an embankment, and by otherwise obstructing the natural flow of the surface water from plaintiff's land, and the natural flow of water from a spring on plaintiff's land (which produces a continued flow of water), thus causing all of said water to pond on plaintiff's land and to flow back thereon, out of its natural course, and to spread thereon, and rendering said land, which was otherwise valuable, unfit for cultivation and valueless."

The jury found for the defendant, and the plaintiff appeals, basing his appeal upon the following exceptions to the charge of the circuit judge: 1. Because his honor erred in charging the jury that "it is not enough that what the proprietor does interferes with the convenient use of his neighbor's land. That does not touch it. Any act for which he is responsible in damages must produce a direct and positive effect upon the property of his neighbor." 2. Because his honor erred in charging the jury that "the result must be the natural consequence of the act done. . . . If the natural and probable consequence of the act is to inflict some actual, positive injury, then he will be responsible in damages."

The charge of the circuit judge is set out in full in the case, and we think it furnishes its own best vindication from the errors imputed in the exceptions; and for this purpose it should be embraced in the report of the case. The first exception seems to impute two errors to the circuit judge: 1. In saying that the fact that the act done by one proprietor on his own land interferes simply with the convenient use of his neighbor's land is not sufficient to give a right of action for such act; 2. That to render one responsible in damages for an act done by the defendant on his own land, such act must produce a direct and positive injurious effect upon the property of his neighbor. It is true that in this exception it is not stated that the language there quoted from the charge was used in reference to an act done by defendant upon his own

land; but by examining the charge, it is apparent that these extracts were taken from that portion of the charge where the judge was speaking of an act done on defendant's own land, and therefore the charge must be considered as applicable to a case in which it is sought to make a person liable for damages alleged to have resulted from an act done on his own land.

Inasmuch as a person has the unquestionable right to use his own property as he chooses, doing with it as he pleases, the mere doing of an act upon one's own property cannot, of itself, render one liable to an action for damages, but such liability must depend upon the manner in which it is done, or upon the nature of the act itself. If it is done so negligently as that thereby his neighbor's property is injured, or if the act is such that its natural and probable consequences would be to injure the neighbor's property, then the wrong consists in the negligence with which the act is done, or that the act itself was of such a nature as that the natural and probable consequences of it would be to injure the neighbor. The mere fact that the act causes inconvenience to the neighbor is not sufficient, for it is very obvious that there are very many acts which a person may lawfully and with perfect immunity do upon his own premises which may result in some inconvenience to his neighbor. To support this view, it is only necessary to refer to the cases collected in 5 Am. & Eng. Ency. of Law, 74 et seq., and to the case of *Thompson v. Richmond etc. R. R. Co.*, 24 S. C. 366, where it was held that section 1511 of General Statutes was enacted for the express purpose of eliminating any question of negligence, or any question of remote or proximate cause, in an action against a railroad company to recover damages for any injury sustained by fire which originated on the right of way of a railroad company from some act of the company, or its agent or employee, thereby impliedly recognizing the correctness of the rule above laid down as to persons other than railroad companies.

What we have said disposes of the question presented by the second exception; for it cannot for a moment be held that a person can be held responsible for all possible consequences which may result from a lawful act done upon his own premises, as even the most innocent and necessary act which may be done by one upon his own premises may possibly result in some injury to his neighbor.

The judgment of this court is, that the judgment of the circuit court be affirmed.

REAL PROPERTY — LIABILITY FOR INJURIES TO ADJACENT LANDS. — If the defendant used due diligence in firing his land, and on account of inevitable accident the fire escaped and burned plaintiff's rails, defendant will not be liable: *Miller v. Martin*, 16 Mo. 508; 57 Am. Dec. 242, and note. A land-owner firing a prairie must use reasonable precautions to prevent injury to others, and will be liable for a failure so to do: *Johnson v. Barber*, 5 Gilm. 425; 50 Am. Dec. 416; *Webb v. Rome etc. R. R. Co.*, 49 N. Y. 420; 10 Am. Rep. 389, and note. Liability for firing adjacent lands generally: Note to *McNally v. Cokwell*, 30 Am. St. Rep. 501-507. For discussion of the question of liability for damage done to others from acts committed on one's own land, see note to *St. Peter v. Denton*, 17 Am. Rep. 263; also extended notes to *Hay v. Cohoes Co.*, 51 Am. Dec. 283, and *Radcliff v. Mayor*, 53 Am. Dec. 366. The owner of land making excavations thereon is liable for damage to the adjacent owner, if such damage could have been avoided by the exercise of reasonable care: *Charles v. Rankin*, 22 Mo. 566; 66 Am. Dec. 642, and note. The rightful use of one's land may cause damage to another without any legal wrong: *Haldeman v. Bruckhart*, 45 Pa. St. 514; 84 Am. Dec. 511. A party, in the exercise of a right on his land, which involves danger to his neighbor, is bound to provide against such by all reasonable prudence and care: *Hummell v. Seventh St. Terrace Co.*, 20 Or. 401. See also the case of *McNally v. Cokwell*, 91 Mich. 527; 30 Am. St. Rep. 494, and extended note.

DUNBAR v. PORT ROYAL AND AUGUSTA R'Y Co.

(36 SOUTH CAROLINA, 110.)

COMPLAINT IN ACTION ON SPECIAL CONTRACT NEED NOT ALLEGE DEFENDANT TO BE COMMON CARRIER. — In an action brought by a shipper of perishable property against a railroad company to recover damages for its failure to forward the property, where the complaint alleges that the defendant contracted with the plaintiff to ship, transport, and carry such property to its destination, it is not necessary that it should allege that the defendant was a common carrier.

VARIANCE — CONTRACT INVOLVING DIFFERENT RESPONSIBILITIES NOT ADMISSIBLE IN EVIDENCE WHEN. — Where the contract set out in a complaint is a contract to ship, transport, and carry the plaintiff's goods to a certain point, a bill of lading containing a contract to merely forward them to that point, and stipulations that the defendant would not assume any liability beyond its own rails, and would not be responsible for delays or damages from unavoidable causes, is not admissible in evidence, since these are distinct and different contracts, involving different responsibilities.

CONNECTING CARRIERS — EXTENT OF THEIR LIABILITY UNDER CONTRACT TO FORWARD GOODS. — Where a railroad company contracts to forward, not to transport, goods to a point beyond its own line, expressly stipulating that it assumes no liability beyond its own rails, it cannot be held liable in damages for any loss of or injury to such goods, occurring beyond its own line.

ACTION to recover damages. The facts are stated in the opinion.

Elliott and Townsend, for the appellant.

Robert Aldrich, contra.

McIVER, C. J. The plaintiff brings this action to recover damages for the loss of a car-load of watermelons shipped by plaintiff on defendant's road under a contract, as he alleges, to deliver the same to a designated consignee in the city of New York. In the complaint the allegations necessary to be noticed are substantially as follows: That on the 17th of July, 1889, the plaintiff delivered to defendant, at one of its stations, a car-load of watermelons, consigned to J. A. Judge, in the city of New York; that defendant received said goods, "and agreed to ship, transport, and carry the same" for the freight price of \$103.20, to be paid at the point of destination, according to the custom of defendant company at that time and prior thereto; that defendant transported said melons to a station on its road called Yemassee, *en route* for New York, refusing to carry them farther unless the freight was paid in advance; that plaintiff received no notice of such refusal until he knew, from the perishable nature of the goods, they must be damaged to such an extent as to render them valueless, and after plaintiff refused to pay the freight as demanded, defendant carried said goods to their destination, but on reaching there they were, by reason of the delay in transportation, damaged to such an extent as to prove a total loss to the plaintiff.

The case came on for trial before his honor Judge Aldrich, and after the complaint was read, and before reading the answer, which will be hereinafter referred to, the counsel for defendant interposed an oral demurrer, upon the ground that the complaint failed to state facts sufficient to constitute a cause of action, which being overruled, the trial of the cause proceeded.

In the answer, defendant denies the material allegations of the complaint, especially that defendant had agreed "to ship, transport, and carry" said melons to New York, and say that the melons were carried by defendant to Yemassee, and there defendant offered and attempted to deliver them without delay to the Charleston and Savannah Railway Company, whose road connects with defendant's at that point, and is a usual connecting line with defendant's road *en route* to New York, a place beyond the terminus of defendant's road, but that said Charleston and Savannah Railway Company refused to receive said goods unless the freight was prepaid; that de-

defendant used due diligence in notifying the plaintiff of such refusal, and requested the plaintiff to pay the freight or direct what disposition should be made of the melons, which plaintiff declined to do; that thereafter said Charleston and Savannah Railway Company received said goods from defendant to be forwarded over their road to New York.

In the course of the testimony, plaintiff offered in evidence the bill of lading given by defendant to plaintiff when the melons were shipped, which was objected to upon the ground that such paper set forth a contract different from that set out in the complaint; the difference being in the initials of the agent of the defendant company, which is not insisted upon here, and in the fact that in the contract, as alleged in the complaint, the defendant agreed "to ship, transport, and carry," while that stated in the bill of lading was that the defendant received the goods "to be forwarded in accordance with the provisions, stipulations, and exceptions of the general rules and regulations and freight tariffs of the company." The bill of lading also contains the following stipulations: "This company assumes no liability beyond its own rails. . . . This company will not be responsible for delays or damages from unavoidable causes, nor guarantee any special dispatch in the transportation of any article." The objection to the introduction of the bill of lading was overruled (to which defendant excepted), and it was received in evidence, and a copy thereof appears in the case.

Under the charge of the judge, the jury found a verdict in favor of plaintiff, and defendant appeals upon the several grounds set out in the record. These grounds allege error, on the part of the circuit judge, in the following particulars, substantially: 1. In overruling the demurrer; 2. In overruling defendant's objection to the introduction of the bill of lading; 3. In the construction of the contract evidenced by the bill of lading.

As to the first, we do not think there was any error. If, as was alleged in the complaint, the defendant contracted with the plaintiff "to ship, transport, and carry" his melons to New York, and either failed entirely to perform the contract, or failed to perform it with that reasonable and prompt dispatch that would be implied from the perishable nature of the goods, then unquestionably the defendant would be liable for such breach of its contract. As the complaint, reasonably construed, does, in our opinion, state such a con-

tract, and its breach by defendant, we think it does state facts, which, if true, would give the plaintiff a cause of action. The absence of an allegation that defendant was a common carrier, upon which this ground of appeal seems to be mainly rested, cannot affect the question. The defendant is not sued as a common carrier, but the action is based upon a special contract, which any person, natural or artificial, may make, whether he be a common carrier or not.

The second ground is, we think, well taken. The contract, as set out in the complaint, is a contract "to ship, transport, and carry" the goods to New York, whereas the contract evidenced by the bill of lading offered in evidence was a contract to forward the goods to New York, with a special stipulation that the defendant company "assumes no liability beyond its own rails," and "will not be responsible for delays or damages from unavoidable causes." These are distinct and different contracts, involving different responsibilities, as will be seen from the cases which will hereinafter be cited. It seems to us, therefore, that it was error to allow the plaintiff to offer in evidence a contract different from that set out in the complaint. But as this objection might possibly be obviated by amendment, under the case of *South Carolina R. R. Co. v. Barrett*, 12 S. C. 173 (which, however, the writer must say has never commanded the approval of his judgment, though it does command his assent as an authoritative decision of the court of last resort), it is necessary to proceed to the consideration of the last and controlling question in the case, viz., whether the judge erred in his construction of the contract evidenced by the bill of lading.

In *Insurance Co. v. Railroad Co.*, 104 U. S. 157, Mr. Justice Harlan says the rule as sanctioned by that tribunal, and adopted in most of the courts of this country, is, "that the carrier, in the absence of a special contract, express or implied, for the safe transportation of goods to their known destination, is only bound to carry safely to the end of its line, and there deliver to the next carrier in the route." The same rule was recognized in the case of *Railroad Co. v. Pratt*, 22 Wall. 123, and in that case the distinction between a contract "to transport" and a contract "to forward" is plainly and distinctly recognized. As said by Mr. Justice Hunt in that case: "Transported or carried are equivalent terms, and quite distinct from the idea of forwarding"; and as the word "transported" was used in the bill of lading in that case, it

was held that the contract bound the carrier to transport or carry beyond its own lines.

In *Crawford v. Southern R. R. Ass'n*, 51 Miss. 222, 24 Am. Rep. 626, it was held that a railroad company, by simply receiving freight marked for delivery at a point beyond its own lines, does not thereby contract to transport and deliver at the point of destination, and is only bound to seasonably deliver the freight to its connecting line on the usual route to the point of destination. In that case, the terms of the bill of lading were, so far as the question we are considering, practically identical with the terms of the bill of lading in this case, for it acknowledged receipt of the goods, "to be forwarded to Birmingham, Alabama," a point with which defendant's line did not connect, except by intervening lines of other companies. To the same effect, see *Grindle v. Eastern Exp. Co.*, 67 Me. 317; 24 Am. Rep. 81; *Knight v. Providence etc. R. R. Co.*, 13 R. I. 572; 43 Am. Rep. 46; *Burroughs v. Norwich etc. R. R. Co.*, 100 Mass. 26; 1 Am. Rep. 78; and also *American Exp. Co. v. Second Nat. Bank*, 69 Pa. St. 394; 8 Am. Rep. 268. In that case, Sharswood, J., points out the distinction between a contract to carry and a contract to forward. The same doctrine is, it seems to us, justly deducible from the decision of this court in the case of *Piedmont Mfg. Co. v. Columbia etc. R. R. Co.*, 19 S. C. 353, though the case is not exactly in point; for there it is laid down that the obligation on the part of a carrier to transport goods beyond its own line arises only from the contract of the parties, and that even the payment of the through-freight to a point beyond its own terminus does not make it a common carrier over other roads to the point of destination. See also *Felder v. Columbia etc. R. R. Co.*, 21 S. C. 35; 53 Am. Rep. 656.

Now, in this case, the contract on the part of the defendant being to forward, and not to transport, accompanied with the express stipulation that defendant "assumes no liability beyond its own rails," we think the circuit judge erred in construing the bill of lading as a contract to carry the goods to New York. This case is very different from that of *Kyle v. Laurens R. R. Co.*, 10 Rich. 382, 70 Am. Dec. 231, for there the contract stated in express terms that the cotton was to be delivered in Charleston. The fact that the contract in this case provided for the payment of the entire freight in New York could not affect the question of defendant's liability, unless it had appeared that defendant had refused or delayed

transporting the goods unless the freight due it should be first paid. When defendant company transported the goods to the nearest connecting line by the usual route to New York, and there offered and attempted to deliver them to such connecting line, to be forwarded to the point of destination, it fully performed its part of the contract, and cannot be held, in the face of its express stipulation to the contrary, liable for any damages occurring "beyond its own rails."

The judgment of this court is, that the judgment of the circuit court be reversed, and that the case be remanded for a new trial.

CARRIERS — LIABILITY OVER CONNECTING LINES. — A carrier may, by express contract, confine its liability for negligence to its own line, and make itself simply the agent of connecting lines, so as to exempt itself from liability for the negligence of a connecting line: *Harris v. House*, 74 Tex. 534; 15 Am. St. Rep. 862, and note; *Nines v. St. Louis etc. R'y Co.*, 107 Mo. 475; *Peterson v. Chicago etc. R'y Co.*, 80 Iowa, 92; note to *Savannah etc. R'y Co. v. Harris*, 23 Am. St. Rep. 558. For an extended discussion of the power of a carrier to limit his responsibility to his own line, see monographic note to *Wells v. Thomas*, 72 Am. Dec. 231; also notes to *Hadd v. United States etc. Exp. Co.*, 36 Am. Rep. 761; *Nashville etc. R. R. Co. v. Sprayberry*, 35 Am. Rep. 708; *Hill v. Syracuse etc. R. R. Co.*, 29 Am. Rep. 166; *Gray v. Jackson*, 12 Am. Rep. 40; *Lawrence v. Winona etc. R. R. Co.*, 2 Am. Rep. 141. The liability of a common carrier is limited to its own route, unless the contract is to carry the goods to their ultimate destination: *McConnell v. Norfolk etc. R. R. Co.*, 86 Va. 243; *Richerson etc. Mill Co. v. Grand Rapids etc. R. R. Co.*, 67 Mich. 110. See *Alabama etc. R. R. Co. v. Thomas*, 89 Ala. 294; 18 Am. St. Rep. 119, and note.

SULLIVAN v. SUSONG.

[86 SOUTH CAROLINA, 237.]

AMOUNT OF WORK DONE ASCERTAINED IN MODE DIFFERENT FROM THAT AGREED ON, WHEN LATTER MADE IMPOSSIBLE. — Where certain work of grading for a railroad has been done at fixed prices, under an agreement that the amount of the work is to be ascertained by a remeasurement thereof, to be made by certain engineers, and that mode of ascertainment becomes impossible without the fault of either party, the amount of the work done may be ascertained from other competent testimony, and the court may base a decree upon such testimony.

QUESTIONS OF FACT, CONCLUSION OF TRIAL COURT ON, SUSTAINED BY SUPREME COURT WHEN. — The conclusions reached by the trial court upon questions of fact will be sustained by the supreme court, unless such conclusions are without any testimony to sustain them, or are manifestly against the weight of the evidence.

THE special master to whom the case was resubmitted after the former decision required each of the parties to select a

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competent engineer to remeasure the work done by the plaintiff in grading the railroad. He reported that George W. Earle and W. R. Powell, skillful and competent civil engineers, were so appointed, and that they reported to him the impossibility of remeasuring the work. He therefore reported as a matter of fact that it was impossible to remeasure the work, and held as a matter of law that the plaintiff was entitled to the value of the work done by him for the railroad company, the amount of the work to be ascertained from the evidence, and its value computed according to the stipulations of the contract under which it was done. He ascertained from the testimony offered the value of the work done, and recommended that judgment be rendered for the plaintiff in the sum of \$10,518.26, with interest thereon. To this report the following exceptions were filed: 1. Because the referee erred in finding as matter of fact that a remeasurement of the work is impossible; 2. Because he erred in finding as a matter of law that the value of the work done was to be computed according to the stipulations of the contract under which the work was performed, to wit, the original contract between plaintiff and the railway company; 3. Because he erred in holding that the plaintiff was remitted to his original contract between plaintiff and railroad company; 4. Because he erred in decreeing judgment against the defendant in the sum of \$10,518, with interest and costs; 5. Because he erred in not holding and decreeing that the plaintiff should first refund to the defendants the cash payment made him by them before he could be remitted to his rights under his original contract with the railroad company; 6. Because he erred in not holding as a matter of fact that the engineers, Earle and Powell, had not resurveyed and remeasured the work as ordered, but had reported that it was doubtful if remeasurement and survey could be completed by the 10th of September, 1889; 7. Because he erred in not holding that the said engineers had not attempted to remeasure the whole work, but only a part; 8. Because he erred in not holding that the said engineers, or others to be selected in their stead, should proceed to remeasure and resurvey the whole work on said railroad and make report to him, said referee, before he could consider and decide the case. The circuit judge overruled the exceptions, confirmed the report in all respects, and rendered the judgment recommended therein.

W. C. Benet, for the appellant.

Henderson Brothers, contra.

McIVER, C. J. This being the second appeal in this case, it is unnecessary to make any statement of the nature of the case or of the facts, as they may be found fully set forth in the report of the former decision, in 30 S. C. 305.

In accordance with the former judgment of this court, the case was recommitted to the special master, who, as directed by the former decision, required the parties each to select a competent engineer to remeasure, if practicable, the work done by the plaintiff in grading the railroad. These engineers proceeded to examine the work, made their report to the special master, upon which they were examined as witnesses, and the special master, upon that testimony, all of which is set out in the case, together with the testimony previously taken in the case, which was authorized to be used on the present hearing, reached the conclusion that it was now impossible to remeasure the work, and therefore the plaintiff was remitted to his original rights, which he held were to be paid for the work which he actually did under his contract with the railroad company according to the scale of prices therein stipulated, and having determined the value of the work thus done, he ascertained the balance due to the plaintiff to be the sum of \$10,518.28, and he therefore made his report, embodying the views thus briefly stated, and recommended that the plaintiff have judgment against the defendants for the said balance, together with costs and disbursements, except the cost of the attempted remeasurement, which, by their agreement, is to be divided equally between the plaintiff and the defendants; making provision, also, that when the judgment is paid the plaintiff shall turn over to the defendants all of the uncollected notes held by him as collateral security.

To this report the defendants filed numerous exceptions, which are set out in the case, and the case came before his honor Judge Fraser for a hearing upon the report and the exceptions, who rendered judgment, confirming the report in all respects, and from this judgment defendants appeal upon the several grounds set out in the record, which are substantially the same as the exceptions to the report of the special master. Under the view which we take of the case, we do not deem it necessary to state these grounds specifically, though they, together with the report of the special master

and the decree of the circuit judge, should be incorporated in the report of the case.

According to our view, every question which was or could have been made in the case was concluded by the decree of Judge Pressley, affirmed by this court, except two, and they were questions of fact merely. There can be no doubt that the plaintiff did certain work for which the defendants had, by their contract, agreed to pay, at the rates fixed by the contract between the plaintiff and the railroad company; and the only question between the parties was as to the amount of such work, which it was agreed should be ascertained by a remeasurement by competent engineers, selected by the parties respectively. But when the mode of ascertaining the amount of the work agreed upon by the parties became impossible, through no fault of either of them, as had been found to be the fact, then, as the circuit judge very properly says, it would amount to a denial of justice to hold that the amount of the work should not be ascertained in some other way. It seems to us, therefore, that the only questions remaining in the case are: 1. Whether a remeasurement was impossible; and if so, 2. Whether the testimony before the special master was sufficient to sustain his conclusion as to the amount of the work done by the plaintiff. Both of these questions being questions of fact, under the well-settled rule we would be bound to sustain the concurrent finding of the special master and the circuit judge, unless their conclusions are without any testimony to sustain them, or are manifestly against the weight of the evidence.

It certainly cannot be said that there is no testimony to support the conclusions of the special master and circuit judge as to either of these questions; and the only inquiry therefore is, whether they are manifestly against the weight of the evidence. In view of the lapse of time, and the undisputed testimony as to the condition of the road-bed, — washed, ditches and cuts filled in, plowed over, miles of it in crops, used and worked upon in portions as a public highway, — we are quite prepared to agree with the special master that a remeasurement was practically impossible, and that if attempted, it would amount largely, as one of the witnesses said, to “pure guess-work.” The fact that the engineers last appointed to make the remeasurement speak of the difficulty of doing the work assigned them within the time limited amounts to nothing, in view of the further fact that before the expiration of the

time allowed they had made a sufficient examination of the work to satisfy them that a remeasurement, with anything approaching to accuracy, was impracticable, and if attempted, would amount largely to guess-work.

If there was no error in finding that a remeasurement was impossible, the only remaining inquiry is, whether there was any testimony to sustain the conclusion reached by the special master as to the amount of the work done. The most casual examination of the testimony set out in the case will show that there was such testimony, and we cannot say that the conclusion reached was manifestly against the weight of the evidence.

The judgment of this court is, that the judgment of the circuit court be affirmed.

CONTRACTS.—CONDITIONS PRECEDENT—NECESSARY PERFORMANCE OF: See note to *Oakley v. Morton*, 62 Am. Dec. 54; also notes to *Patterson v. Gage*, 56 Am. Dec. 98; *McKinney v. Springer*, 54 Am. Dec. 479; and *Butterfield v. Byron*, 25 Am. St. Rep. 660. Where the continued existence of the means of performing a contract is essential to its performance, and there is nothing to indicate a substituted performance as within the design of the parties, such continued existence of such means is a condition without which, in the absence of fault, there can be no liability: *Shear v. Wright*, 60 Mich. 159.

APPEAL—FINDINGS OF FACT—DISTURBANCE ON.—Where the evidence upon the trial of an issue of fact is conflicting, the decision of the trial court thereon will not be disturbed by the supreme court, if it believes it to be warranted by the testimony: *Alabama etc. Ry Co. v. Bolding*, 69 Miss. 255; 30 Am. St. Rep. 541, and note with cases collected.

JORDAN v. NEECH.

[86 SOUTH CAROLINA, 295.]

DEED—WORDS IN, SUFFICIENT TO CONVEY ESTATE IN LAND.—The following words in a deed from a grantor to a grantee, made in consideration of love and affection, are sufficient to convey an estate in the land, and operate to convey such an estate, and do not create a copartnership between the parties thereto: "Do give and release unto him so much land at, along, below, and above the mill-dam upon my land, known by the name of the Mill's Old Dam, and adjoining his, as will serve for the purpose of cutting a race, and for waste-way and mill, all conveniences in putting up same and lumber-yards, also free ingress and egress to and from said mill or pond through my lands, and also of backing water upon my land to the height of thirteen feet live water, and all the privileges of said mill two thirds of the time, reserving to myself one third part of said mill after paying one third part of whatever amount it may cost him in putting in operation said mill."

LIFE ESTATE CANNOT BE ENLARGED INTO FEE BY WARRANTY CLAUSE IN DEED. — Where a deed, owing to the absence of words of inheritance in the conveying part, creates only a life estate in the grantee, such estate cannot be enlarged into a fee by the use of the word "heirs" in the warranty clause.

PARTITION—OWNER OF LIFE ESTATE IN LAND MAY DEMAND. — A party having a life estate in two thirds of a mill site is entitled to demand partition between himself and the owner in fee of the other third.

ACTION for partition. The facts are stated in the opinion.

Henderson Brothers, for the appellant.

Walter Ashley, contra.

McIVER, C. J. The plaintiff and his mother-in-law, Mrs. Catherine A. McGrew, being the owners of adjacent tracts of land separated by the waters of Dean Swamp, on the first day of October, 1869, Mrs. McGrew executed a paper under her hand and seal, in the presence of two subscribing witnesses, of which the following is a copy: "Know all men by these presents, that I, Catherine A. McGrew, . . . for the love and affection I have and bear to my son-in-law, John Jordan, . . . do give and release unto him so much land at, along, below, and above the mill-dam upon my land, known by the name of the Mill's Old Dam, and adjoining his, as will serve for the purpose of cutting a race, and for waste-way and mill, all conveniences in putting up same and lumber-yards, also free ingress and egress to and from said mill or pond through my lands, and also of backing water upon my land to the height of thirteen feet live water, and all the privileges of said mill two thirds of the time (reserving to myself one third part of said mill after paying one third part of whatever amount it may cost him (Jordan) in putting in operation said mill), the same being situated on Dean Swamp, . . . the right to which I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend unto the said John Jordan, his heirs and assigns forever (reserving to myself the same privileges given and relinquished to him)."

Soon after the execution of this paper, the plaintiff proceeded to erect a mill at a cost of something over two thousand dollars, Mrs. McGrew giving her note to plaintiff for the amount agreed upon as her third of the expense incurred in erecting the mill. For a while the mill was used by the parties in accordance with the terms of said paper, the plaintiff having the exclusive use for two thirds of the time, and Mrs.

McGrew the exclusive use for one third. After a time, however, they leased the mill to one Tyler for the term of ten years, the plaintiff receiving two thirds and Mrs. McGrew one third of the rent. Before the expiration of this lease it was surrendered, and subsequently the plaintiff and Mrs. McGrew divided the use of the Mill as before, until the 9th of February, 1875, when Mrs. McGrew conveyed her interest to her daughter, Mrs. Holman, her husband, B. C. Holman, and the defendant, Idella L., who subsequently became the wife of the defendant, John A. Neece; and the use of the mill continued to be divided as before between the plaintiff and these grantees of Mrs. McGrew until the mill was destroyed by fire some time in the year 1875.

On the 8th of February, 1879, Holman and wife conveyed their interest in the mill to the defendant, Mrs. Neece, in pursuance of a previous agreement to that effect; and on the 8th of July, 1878, though prior to the last-mentioned conveyance, but subsequent to the agreement that the same should be made, an arrangement was made between the plaintiff and the defendant John A. Neece for the rebuilding of the mill, in which said John A. Neece undertook to convey to the plaintiff, "for and in consideration of the copartnership of putting up or rebuilding a saw-mill in the Mill's Old Dam, on Dean Swamp, with John Jordan, and the keeping up in a navigable condition the waste-way therein, do give and grant to the said Jordan privilege of backing water on our land to the height of ten feet live water, ingress and egress through my land to and from said mill and pond, so as not to damage any lands now in or may hereafter be put in cultivation, nor shall he be required to use or open a road that will throw him out of a direct course to said mill-pond more than four hundred yards, and the right of using the most convenient soil or dirt in keeping up said mill-dam and filling up around said mill and waste-way, the use of lumber-yard two thirds of the time, the same being his time of using said mill"; and on the same day the plaintiff, by his deed to the said John A. Neece and wife, in consideration of said copartnership, conveyed to them the same privileges, with the same reservations, in his land.

In pursuance of this arrangement, the mill was rebuilt, and continued to be used by the plaintiff and the Neeces, upon the same terms as before, until some time in 1887, when that mill was again burned. The plaintiff, wishing again to rebuild, after some negotiations with Mrs. Neece for that purpose,

which proved to be fruitless, determined to rebuild the mill himself, and so notified the defendants. After plaintiff had made his preparations to rebuild, and made some progress in the work, defendants forbid his proceeding, and obstructing the work even to the extent of cutting the dam, the plaintiff, on the 17th of September, 1888, commenced this action. In his complaint he claims that he is the owner in fee of two undivided third parts of the property described in the deed from Mrs. McGrew, and that the defendant Mrs. Neece is the owner of the remaining one undivided third, and he demands judgment that defendants be enjoined from obstructing his work of rebuilding the mill or interfering therewith, or that the property be sold for partition.

The circuit judge held that the deeds under which plaintiff claims were not conveyances of the land, but simply "covenants to stand seised of the same to the use and for the purposes of the copartnership so long as it should continue, and no longer"; that from the nature of the copartnership it was without limit as to time, and there being no provision for its dissolution by either party, it could be determined by either party at any time, and was practically dissolved when the defendants refused their consent to the rebuilding of the mill; and that the land, having fulfilled the purposes to which it had been dedicated, reverts or remains in the parties in whom the legal title is vested. He therefore rendered judgment dismissing the complaint. From this judgment plaintiff appeals upon the several grounds set out in the record.

It seems to us that this appeal turns largely upon the construction of the deed from Mrs. McGrew to the plaintiff, for the plaintiff cannot, and as we understand does not, claim under the deed from John A. Neece, who was not the owner of the land, and who, so far as appears, had not the slightest authority to dispose of the property of his wife. We do not think that the deed from Mrs. McGrew to the plaintiff can be properly construed as a covenant to stand seised of the land to the use and for the purpose of the copartnership, but, on the contrary, that it must operate as a conveyance of the land itself. The paper is manifestly very inartistically drawn, and hence the use of the word "give," which, it is urged, is not appropriate to a conveyance, is not a circumstance entitled to any weight. It was very natural that such a word should be used in a paper not resting on any valuable consideration, but based solely upon love and affection, — intended to be a free

gift. The paper does not purport to transfer the use of the land for any particular purpose, but the land itself. The language is, "do give and release unto him so much land . . . as will serve for the purpose of cutting a race," etc. It is not that the use of so much land as will be needed to cut the race, etc., is given. The words "serve for the purpose," relied upon to show the intention of granting an easement merely, and not the land itself, were manifestly used to indicate the amount of land conveyed. The parties probably did not know how much land would be needed to cut the race, etc., and hence the land intended to be conveyed is not described as so many acres or so many feet, but simply "so much land at, along, below, and above the mill-dam upon my land, known by the name of the Mill's Old Dam, and adjoining his, as will serve for the purpose," etc.

There is not a word in the paper, so far as we can discover, which indicates that the idea of any copartnership was in the minds of the parties. On the contrary, it seems to us that the language used in the paper, to which we must resort for its proper construction, shows that the intention of Mrs. McGrew was to give her son-in-law so much of her land as would be necessary to cut the race, etc., with a reservation to herself of one undivided third part thereof. The material element of a partnership—an agreement to share in the losses as well as the profits—is wholly wanting. During the time, two thirds which plaintiff was to have the use of the mill, Mrs. McGrew would have had no right to share in the profits, nor be responsible for any losses that might be incurred; and so, likewise, the plaintiff during the time, one third, which Mrs. McGrew would be entitled to the use of the mill, the plaintiff would incur no liability for losses, nor be entitled to any portion of the profits. There is not only nothing in the deed to indicate that the idea of a copartnership was in the minds of the parties, but we hear nothing of it in the testimony for several years after the execution of the deed.

Holding, then, as we do, that an undivided two-thirds interest in the land was conveyed to the plaintiff, our next inquiry will be as to the nature and extent of the estate thus conveyed. It is very obvious that the deed, upon its face, owing to the absence of any words of inheritance in the conveying part, creates nothing but a life estate in the plaintiff; but plaintiff contends that by the operation of equitable estoppel, arising from the use of the word "heirs," in the

warranty clause, as well as from the long possession of the plaintiff and the acts of the parties, the estate conveyed should be construed to be an estate in fee, and not a mere life estate. It is conceded that an estate cannot be enlarged by the warranty, but the contention, as we understand it, on the part of the plaintiff, is, that the use of the word "heirs," in the warranty clause, is sufficient to show that the real intention of the grantor was to convey the fee, and that she and those claiming under her are estopped from disputing a construction in accordance with such intention. We cannot accept this view; for if it should be adopted, it would fritter away and practically destroy the well-settled and conceded rule that the warranty clause cannot operate so as to enlarge the estate granted. Indeed, in most cases where deeds drawn by unskillful draughtsmen fail to carry the fee, by reason of the omission of the requisite words of inheritance, the real intention of the parties is defeated, and we do not think the use of the word "heirs," in the warranty clause, can be used to establish such intention, especially where found in a deed so inartificially drawn as this is. Nor do we see anything in the testimony to aid in raising such estoppel. We see no reason why the question as to the nature of plaintiff's estate should have been the subject of controversy, or even conversation, before it was suggested by an examination of plaintiff's deed pending the negotiations for rebuilding the mill.

It seems to us, therefore, that the plaintiff and the defendant, Mrs. Neece, are now tenants in common of the land in question, he being entitled to an undivided two thirds for his life, with remainder to the heirs at law of Mrs. Catherine McGrew, who died before the commencement of this action, and she (Mrs. Neece) being entitled to the remaining one third in fee, and that the plaintiff is entitled to demand partition thereof, as provided for by section 1829, General Statutes.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the case be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced.

DEEDS — EFFECT OF COVENANT OF WARRANTY UPON ESTATE GRANTED BY. — Covenant of general warranty in a deed is intended to defend only the estate granted, and cannot enlarge that estate: *Hull v. Hull*, 35 W. Va. 155; 29 Am. St. Rep. 800; *Adams v. Ross*, 30 N. J. L. 505; 32 Am. Dec. 237. See also note to *Sweet v. Brown*, 45 Am. Dec. 244.

PARTITION—OWNER OF LIFE ESTATE, WHETHER MAY SUE FOR.—A tenant for life cannot ask for partition, where he is in lawful possession and has the permanency of the rents and profits of the entire estate: *Johnson v. Johnson*, 7 Allen, 196; 83 Am. Dec. 676; *Sciders v. Giles*, 141 Pa. St. 93. But see note to *Nichols v. Nichols*, 67 Am. Dec. 709, for a discussion of this subject, and in which it is contended that a tenant for life may compel partition.

NORWOOD v. NORWOOD.

[36 SOUTH CAROLINA, 331.]

EQUITABLE DEFENSE NOT LOST BY FAILURE TO SET IT UP IN ANSWER WHERE.—A defendant does not lose his right to set up the defense of purchaser for a valuable consideration without notice, as against his co-defendant, by failing to plead it specially in his answer.

PLEADING BY PARTY SUSTAINING DUAL CHARACTER—PROPER MODE OF.—Where a party to an action appears in two characters,—for example, as an individual and as a partner,—he ought to appear only as a plaintiff or as a defendant, setting forth his several rights in the subject-matter of the action. It is defective pleading for one and the same person to appear as both plaintiff and defendant in the same action.

LIEN OF SECRET OR UNRECORDED MORTGAGE DISPLACED BY THAT OF SUBSEQUENT RECORDED MORTGAGE.—The lien of a secret or unrecorded mortgage is displaced by that of a mortgage subsequently delivered and duly recorded, even though such recorded mortgage is given to secure an antecedent indebtedness. Where, therefore, after a recorded mortgage to secure future advances for the current year has been satisfied in fact, an agreement, not recorded, is made to continue such mortgage for advances of the next year, and after some advances are made thereunder the mortgagor makes another mortgage to a third person, who has no knowledge of the prior mortgage, to secure an antecedent debt, which latter mortgage is duly recorded, this recorded mortgage will have priority over the secret lien of the unrecorded agreement. In such case, the record of the later mortgage was notice to the prior mortgagee from its date, and the advances made by him after that date were at his peril. And the mortgagor, by executing the second mortgage, deprived himself, by his own act, of the right to demand further advances under the agreement.

ACTION to foreclose a mortgage. The facts are stated in the opinion.

H. H. Newton, for the appellant.

R. T. Gaston, contra.

POPE, J. The issues in the action originally begun on the 17th of January, 1890, in the court of common pleas for Marlboro County have been reduced to a contention between the two defendants, George A. Norwood & Co. on the one side, and E. H. Frost & Co. on the other side, as to the priority of

mortgages held by them respectively. Judge Hudson, who heard the cause on the circuit, decided that E. H. Frost & Co. had prior lien, and decreed accordingly. From that decree the defendants George A. Norwood & Co. appeal to this court on fourteen grounds of appeal, as follows: —

1. Because his honor the presiding judge erred in holding that the mortgage of defendants E. H. Frost & Co. is entitled, out of the proceeds of sale of the mortgaged premises, to priority in payment to the mortgage of G. A. Norwood & Co.

2. Because his honor erred in holding that the mortgage of G. A. Norwood & Co. was in fact paid on the thirteenth day of January, 1885, the date of the first renewal of the same by C. N. Rogers and N. S. Rogers.

3. Because his honor erred in holding that the renewal of the bond and mortgage by C. N. Rogers and N. S. Rogers to G. A. Norwood & Co. was a secret agreement, and could not affect the rights of the defendants E. H. Frost & Co., who were junior mortgagees.

4. Because his honor erred in not holding that the mortgage of the defendants G. A. Norwood & Co., being prior in date and unpaid, should be preferred, in its payment, to the bond and mortgage of E. H. Frost & Co.

5. Because his honor erred in not holding that the renewal of the bond and mortgage to G. A. Norwood & Co. was valid and binding upon the junior mortgagees, E. H. Frost & Co., as the said renewed mortgage was of record and uncanceled.

6. Because his honor erred in not holding that it was incumbent on said junior mortgagees, E. H. Frost & Co., to give actual notice to the senior mortgagees, G. A. Norwood & Co., of the existence of said junior mortgage after its execution, in order to give the latter priority over the former.

7. Because his honor erred in not holding that the senior mortgage of G. A. Norwood & Co. was not such a mortgage as could be affected by actual notice of a subsequent mortgage, as G. A. Norwood & Co. were compelled to make the advances specified in the said renewed bond.

8. Because his honor erred in not holding that the renewal of said bond and mortgage of G. A. Norwood & Co. was a revivor of the same, and was valid as against the subsequent mortgage of defendants E. H. Frost & Co.

9. Because his honor erred in not holding that the account of G. A. Norwood & Co. against C. N. Rogers was a running account, and had not been closed, and that the bond and mort-

gage given to secure the same was to secure an eventual balance which had not been paid at the date of the mortgage to E. H. Frost & Co., nor at any time afterwards.

10. That his honor should have held that the question involved was one of the application of payments by G. A. Norwood & Co. to their account against C. N. Rogers; that there had been no direction of such application by C. N. Rogers, and that the same had been applied to the open account, which was in excess of the security given, thus leaving the balance on account secured by the bond given by C. N. Rogers, and the mortgage given to secure the same.

11. Because his honor erred in not holding that G. A. Norwood & Co. were, at least, entitled to priority under their mortgage over E. H. Frost & Co., to the extent of all amounts due them on account of C. N. Rogers on the twenty-third day of February, 1885, the day the mortgage of E. H. Frost & Co. was executed.

12. That his honor erred in not decreeing the sum of \$669.96, with interest from the date of the advancement of the items composing that amount, on the account of C. N. Rogers, due to G. A. Norwood & Co., at ten per cent per annum, till the date of the decree herein.

13. Because his honor erred in holding that a recital by C. N. and N. S. Rogers in the mortgage to E. H. Frost & Co., to the effect that there was no other encumbrance on the mortgaged premises than the Munnerlyn mortgage, could affect the rights of G. A. Norwood & Co., the senior mortgagees, who knew nothing of such recital.

14. Because his honor erred in holding that there was a settlement between C. N. Rogers and G. A. Norwood & Co., on the 13th of January, 1885, on which day there was a balance due said C. N. Rogers of three hundred or four hundred dollars.

The facts in this case are undisputed, and are about as follows: C. N. Rogers, in February, 1884, agreed with G. A. Norwood & Co. to borrow \$1,000, to be paid on or before January 1, 1885, and that he would ship said firm seventy-five bales of cotton, to be sold by them as factors during the year 1884; and in order to secure such factors, he, with his father, N. S. Rogers, executed their bond to them in the penalty of \$2,000, conditioned for the payment of \$1,000 and interest, etc.; and that on the 1st of January, 1885, G. A. Norwood & Co. held claims against C. N. Rogers for \$2,360.34, and held

to C. N. Rogers's credit \$2,442.58 in money, and six bales of cotton, worth \$277.69. On the 13th of January, 1885, Norwood & Co. owed C. N. Rogers \$2,720.27, and he owed them \$2,376.59,—a difference in Rogers's favor of \$359.93. These two results, to wit, the state of their accounts on the 1st of January, 1885, and also on the 13th of January, 1885, included the bond secured by mortgage. On the 13th of January, 1885, C. N. Rogers made an agreement with G. A. Norwood & Co., which was entered on the bond executed the 23d of February, 1884, by which it was agreed between them that the arrangement for 1884 should be continued for the year 1885. This agreement was not entered on the record of the mortgage, or made known. In other words, while entirely fair and business-like between the parties to the same, it was not made public.

On March 1, 1884, Elizabeth Munnerlyn obtained a mortgage upon the lands in controversy here for two thousand dollars and interest. This is admitted on all hands as the first and preferred lien. On the 23rd of February, 1885, Charles N. Rogers executed a mortgage on these lands to secure an antecedent indebtedness of three thousand dollars to E. H. Frost & Co., representing in the body thereof that there was no lien thereon except that by mortgage to Elizabeth Munnerlyn. It is admitted that E. H. Frost & Co. had no actual notice of the mortgage of George A. Norwood & Co., or of any continuance thereof.

At the hearing, Charles N. Rogers, who was the witness of George A. Norwood & Co., testified that all indebtedness between him and said firm of George A. Norwood & Co. was paid on the 13th of January, 1885, and no testimony or admissions of parties appears to negative such testimony.

Judge Hudson decreed that the lands should be sold, and the proceeds applied,—1. To the payment of the mortgage of Elizabeth Munnerlyn; 2. To the payment of the mortgage of E. H. Frost & Co.; 3. To the payment of the mortgage of George A. Norwood & Co.

From the view we take of this case, it will only be necessary for us to consider the first exception; it includes all the rest.

Before proceeding regularly to respond to the inquiry made of us by the appellants, it is proper that we should notice so much of the appellants' argument as suggests that inasmuch as the defendants E. H. Frost & Co. did not in their answer

set up their defense of purchasers for valuable consideration without notice, they are not entitled to such equitable defense. It may be well to state just here that this exception is not urged by the plaintiff as such, but by the defendants George A. Norwood & Co. The cause of action set up by the plaintiff was the Munnerlyn mortgage. The defendants, E. H. Frost & Co. and George A. Norwood & Co., were only proper parties to his action for the foreclosure of his mortgage, because they held junior encumbrances on the same property. When the defendants Frost & Co. answered the complaint, denying its allegations touching the relative rank of Frost & Co.'s mortgage, and that of Norwood & Co., that was all that was necessary, so far as the plaintiff was concerned. We must not be understood as denying the right of co-defendants to have these equities as between themselves tried in this action. That right has been repeatedly recognized by this court: *Quattlebaum v. Black*, 24 S. C. 55; *Motte v. Schult*, 1 Hill Eq. 146; 26 Am. Dec. 194.

The plaintiff in the case at bar sued as assignee and mortgagee, and did not include his membership of the firm of Norwood & Co. in his character as plaintiff; his name in that latter relation appears here as a defendant. It is defective pleading for one and the same person to appear as both plaintiff and defendant in the same action. Correct pleading requires that a plaintiff or defendant, as the case may be, should unite in himself as such plaintiff or defendant, as the case may be, all the characters he may bear to the subject-matter. Thus if an individual has rights as an individual, and also rights as a trustee (in one of its many forms), or as partner in a firm in one subject-matter, he should be so described. We make these observations here because this is the second instance during the present term of this court in which we have noticed this departure from the rules for pleading, and all the more readily in this case because of the admirable manner in which, in every other respect, the papers have been prepared.

After a careful consideration of the appeal, the writer of this opinion has reached the conclusion that the decree below must be modified, for he was satisfied that Norwood & Co. were entitled to a priority, in so far as the amount advanced to C. N. Rogers, beginning on the thirteenth day of January and ending on the 23d of February, 1885, being the sum of \$686.21, is concerned. This result arises from

these considerations: The circuit judge found as a fact and as a conclusion of law that the written agreement indorsed on the bond and mortgage between Norwood & Co. and C. N. Rogers "was equivalent to the execution of a new bond and mortgage by him to them, and he is bound thereby," on the 13th of January, 1885. This finding of the judge has not been appealed from, and is therefore the law of this case. He also finds that C. N. Rogers executed his mortgage to Frost & Co. on the 23d of February, 1885, and the same was recorded on that day. This is admitted to be true. It also appears that Norwood & Co. advanced to Rogers \$686.21 between the 13th of January, 1885, and the 23d of February, 1885.

It is not material, in the writer's view of the rights of these parties, that the consideration of the mortgage of Frost & Co. was an antecedent indebtedness. It was lawful to make such mortgage, and, under the registry laws of this state, having been duly recorded on that date, it was notice to all the world of their lien on the land from the date of the execution of the mortgage. It is also the law of this state that a mortgage is entitled to the advantage of the doctrine of equity of purchaser for a valuable consideration without notice: *Haynsworth v. Bischoff*, 6 S. C. 165, and cases there cited.

It must be apparent, therefore, that on the twenty-third day of February, 1885, these co-defendants—Frost & Co. and Norwood & Co.—stood in this attitude to each other, growing out of their transactions with C. N. Rogers: Norwood & Co. had a mortgage entitling them to advance from time to time to Rogers not more than one \$1,000, and of this sum they had advanced \$686.21. On this day, Frost & Co., upon an antecedent debt of C. N. Rogers of three thousand dollars, obtained *bona fide* a mortgage from Rogers upon the same land covered by the lien of Norwood & Co. What is the rule equity adopts in such a case? It treats the parties in this way: It asks, Has Frost & Co. parted with any consideration to Rogers previously or on the 23d of February, 1885, either by the surrender to him of any security or the payment of any money, or divesting themselves of any right by which such firm have been placed in any worse situation than they would have been in if they had received notice of Norwood & Co.'s mortgage? Their answer, under the proofs here, would be, No. Then equity supplies relief to Norwood & Co. in this way: It says: You have not complied with the law by recording your mort-

gage, but by an honest dealing with Rogers you have obtained a right that he created by contract to hold his land as a pledge to secure so much money or property, to wit, \$686.21, as you advanced to him prior to the day the law made you take notice of the rights of Frost & Co., and this we give you because, to that extent, you are a purchaser for valuable consideration without notice: *Zorn v. Charleston etc. R. R. Co.*, 5 S. C. 97, and other cases there cited.

But after a very careful examination of the decisions of our courts, and after an interchange of views by the different members of this court, I am directed to announce as its unanimous decision that no such priority exists as to the debt of \$686.21 in Norwood & Co. over the mortgage of E. H. Frost & Co. The very object of the act of 1843 regulating the registry of mortgages was to uproot secret liens, and the provisions of that act have been extended to apply to the registry of deeds of conveyance, as will be seen by reference to section 1776 of our General Statutes. It is true that in both acts reference is to validity of record as to "subsequent creditors and purchasers for valuable consideration without notice." But this court, in *Piester v. Piester*, 22 S. C. 143, 53 Am. Rep. 711, uses this language: "We do not mean to say that the mortgages, having been recorded (although out of time), may not have a valid lien on the land embraced as to such creditors as do not come within the category of subsequent creditors without notice"; thus strongly intimating what its judgment would be when a case should be made as between a creditor whose mortgage, unrecorded, was created prior to a mortgage duly recorded. We cannot say that this precise question has been directly passed upon by our courts, but the *dicta* in our decisions plainly point to the decision when the question shall be presented. This court therefore now announces that a secret mortgage, or a mortgage not recorded, is displaced in lien by a mortgage subsequently delivered and duly recorded, even if the debt secured by the recorded mortgage is an antecedent indebtedness.

So far as any advances made to Rogers by Norwood & Co. after the 23d of February, 1885, they were made at their peril, for the registry laws of this state made the record of Frost & Co.'s mortgage on that day notice, so that it was impossible for them (Norwood & Co.) to avail themselves of the doctrine of purchasers for a valuable consideration, or subsequent creditors without notice. For this court to hold otherwise

would be to nullify the registry laws of this state. The provisions of those laws are beneficent as well as wise. Nor, again, can we accept the views suggested by the appellants as to the effect of the agreement of C. N. Rogers with Norwood & Co., made on the 13th of January, 1885, thus enabling Norwood & Co. to continue their advances beyond the 23d of February, 1885, when Frost & Co. obtained their mortgage, for to do so would be at variance with the decisions of this court in the cases of *Walker v. Arthur*, 9 Rich. Eq. 397; *National Bank of Chester v. Gunhouse*, 17 S. C. 494; and other cases. We cannot hold that Norwood & Co. were bound to continue advances to Rogers after the 23d of February, 1885, for, by the execution of the mortgage to Frost & Co. at that date, he had deprived himself, by his own act, of any right to such advances.

We could not reverse the findings of the circuit judge referred to in the second, fourth, ninth, tenth, and fourteenth exceptions. They relate to findings of fact. Instead of being without any testimony to support them, or being manifestly against the weight of testimony, we find abundant testimony in the case to support them.

It is the judgment of this court that the judgment of the circuit court be affirmed.

PLEADING — DEFENSE, WHETHER LOST BY FAILURE TO PLEAD. — A defense not set forth in the answer is of no avail: *Field v. Mayor*, 6 N. Y. 179; 57 Am. Dec. 435, and note with cases collected; *Cummings v. Coleman*, 7 Rich. Eq. 509; 62 Am. Dec. 402. Where the defense of "bona fide purchaser without notice" is relied upon, notice must be denied fully and positively, though it be not charged in the bill; and if the facts be charged from which such notice may be inferred, such facts must be denied also: *Johnson v. Tomlin*, 18 Ala. 50; 52 Am. Dec. 212, and note.

PARTIES. — A party cannot be plaintiff and defendant in the same suit: *Hill v. McPherson*, 15 Mo. 204; 55 Am. Dec. 142, and note; *Burley v. Harris*, 8 N. H. 233; 29 Am. Dec. 650, and note; *Allin v. Shadbourn*, 1 Dana, 68; 25 Am. Dec. 121.

MORTGAGES — EFFECT OF FAILURE TO RECORD. — A mortgage duly taken and recorded without notice to the mortgages of a prior unrecorded mortgage has priority of lien over this unrecorded mortgage: *Mowry v. Crocker*, 33 S. C. 436; *Constant v. University*, 133 N. Y. 640; *Kelly v. Shepherd*, 79 Ga. 706. The prior execution of a mortgage does not give it the preference; but in order to entitle it to a preference, it must be first recorded: *Clabaugh v. Byerly*, 7 Gill, 354; 48 Am. Dec. 575, and note; *Stansell v. Roberts*, 13 Ohio, 148; 42 Am. Dec. 193, and note. Under the recording act of Iowa, a mortgage is protected against unrecorded instruments in the same way as is a purchaser: *Seever v. Delashmutt*, 11 Iowa, 174; 77 Am. Dec. 139, and note. A mortgage not acknowledged and recorded as required by statute, though good between the parties, is not valid as against subsequent encumbrancers with actual notice of the existence of the mortgage: *Jacoway v. Gault*, 20 Ark. 190; 73 Am. Dec. 494.

HOLLEY v. GLOVER.

(36 SOUTH CAROLINA, 404.)

DOWER, INCHOATE RIGHT OF, DEFEATED BY PARTITION SALE. — The seisin of a husband who acquires title to land as a tenant in common with others is subject to the paramount right of his co-tenants to demand partition. His wife's right of dower therein is therefore subordinate to that paramount right, which, when enforced by a sale made under a decree of the court, defeats her inchoate right of dower in the land, although she was not a party to the action for partition.

DOWER — EFFECT OF CONVEYANCE BY HUSBAND TO THIRD PERSON BEFORE PARTITION. — Where a husband holding land as a tenant in common, in which his wife has an inchoate right of dower, conveys his interest to another person, and the land is thereafter sold under a decree of court in an action for partition to which the husband is a party, but not the wife, such right to dower is defeated, not because the husband was not the wife's representative, but by the exercise of the right of partition, which was paramount to it. The wife was not a necessary party to such action.

SALE OF LAND OWNED BY CO-TENANTS FOR PARTITION — POWER OF COURT OF EQUITY TO ORDER. — A court of equity has power to order a sale for partition of land owned by several tenants in common, either as distributees of an intestate's estate or otherwise.

ACTION to recover dower. The facts necessary to an understanding of the case are sufficiently stated in the opinion.

Henderson Brothers, for the appellants.

J. G. Evans and E. S. Hammond, contra.

McIVER, C. J. All the cases named in the title were actions for dower, and as they all grew out of the same state of facts, and rest upon the same principles of law, they were heard together, both on the circuit and in this court, and will therefore be considered together. By agreement, the cases were heard upon the pleadings and an agreed statement of facts, set out in the case, by the court without a jury. The plaintiff, as the widow of Alfred Holley, claims dower out of the several parcels of land in the possession of the several defendants in the above-stated cases, which several parcels originally constituted a single tract of land known as the Hollow Creek land. From the "agreed statement of facts," which should be incorporated in the report of this case, it appears that some time prior to the year 1839 the said Alfred Holley and one William H. Carey purchased jointly the Hollow Creek land, and the same was conveyed to them as tenants in common, and on the 5th of March, 1841, Alfred Holley conveyed his undivided one-half interest to Wise Holley. Subsequently,

W. H. Carey having died, his son, John L. Carey, instituted proceedings in the court of equity against the other heirs at law of W. H. Carey, together with Alfred Holley and Wise Holley, for the partition of said land, which resulted in a sale of said land under the orders of said court. At such sale one John Holley became the purchaser, and having paid the purchase-money, received titles from the commissioner in equity, and the defendants in the several cases above stated claim under the said John Holley. The purchase-money was divided amongst the several parties to the proceedings, in pursuance of the provisions of the decree of the court under which the sale was made, but the plaintiff herein was not a party to the proceedings, and neither received any portion of the proceeds of the sale, nor was there any provision made for the protection of her inchoate right of dower.

Alfred Holley, the husband of plaintiff, having died in February, 1881, these actions were commenced (when is not stated) by the plaintiff to recover her dower in the several tracts held by the several defendants. The circuit judge held that while a sale for partition would bar the contingent or inchoate right of dower of the wife of one of several tenants in common under proceedings to which he was a party, though the wife was not a party, yet in this case, inasmuch as Alfred Holley had sold and conveyed to Wise Holley his undivided interest in said land before the proceedings for partition were instituted, the plaintiff was not barred of such right, because although Alfred Holley as well as Wise Holley were parties to the partition proceedings, yet neither, nor both of them together, represented the rights and interests of the plaintiff in such proceedings. He therefore rendered judgment in favor of the plaintiff in each of said cases. From these judgments the several defendants appeal upon the several grounds set out in the record; and the plaintiff, according to the proper practice, gives notice that if the supreme court should find itself unable to sustain the judgments appealed from upon the ground taken by the circuit judge, the plaintiff will ask this court to sustain said judgments upon other grounds likewise set out in the record.

These various grounds raise substantially the following questions: 1. Whether the wife of one tenant in common can be barred of her inchoate right of dower by a sale for partition under proceedings instituted by another tenant in common against her husband and the other co-tenants, but to which

the wife was not a party; 2. If so, whether the same rule would apply where the husband, though made a party to the proceedings for partition, had previously conveyed his undivided interest to a third person who was also made a party; 3. Whether the circuit judge erred in finding as matter of fact that William H. Carey died testate; 4. If not, whether the former court of equity had the power to sell lands of a testator for partition amongst those entitled thereto; and if so, whether the inchoate right of dower of the wife of one of the tenants in common would be barred by such sale under a proceeding to which she was not a party.

As to the first question, we are of opinion that while the wife of one of several tenants in common has an inchoate right of dower in her husband's portion of the real estate held in common, yet such right is subordinate to the paramount right of the other tenants in common to have partition of the common property in any of the modes by which such partition may be lawfully made. Hence if a sale for partition becomes necessary, the wife's inchoate right of dower in the land is barred, even though she is not a party to the proceedings for partition; and the purchaser at such sale takes his title disencumbered of such subordinate right of dower. As is said in 1 Washburn on Real Property (3d ed., bk. 1, c. 7, sec. 2, par. 10, p. 185): "The wife of a tenant in common holds her inchoate right of dower so completely subject to the incidents of such an estate that she not only takes her dower out of such part only of the common estate as shall have been set (off) to her husband in partition, but if, by law, the entire estate should be sold in order to effect a partition, she loses by such sale all claim to the land, although no party to such proceedings." Whether, in such a case, some provision should be made for the protection of the wife's inchoate right of dower, in the event it should afterwards become absolute out of the husband's share of the proceeds of the sale, is not a matter now before us, and will not, therefore, be considered.

So far as our experience extends, this rule has always been recognized in this state, and we are not informed that it was ever before questioned. The reason of this rule is this: The right of the other co-tenants to demand partition being paramount to the inchoate right of dower in the wife of any one of the co-tenants, whenever the paramount right is exercised, the subordinate right cannot properly be allowed to interfere with or abridge the full enjoyment of the paramount right. Inas-

much as the inchoate right of dower springs out of and is necessarily dependent upon the concurrence of marriage and seisin of the husband during coverture, it must necessarily depend upon and be qualified by the nature of such seisin. If, therefore, the nature of the husband's seisin be such as will not support the claim of dower,—as, for example, the husband be seised as trustee,—it is competent for the defendant in dower to show such defect in seisin as a defense to the claim of dower. See what is said in *Whitmire v. Wright*, 22 S. C. 451, 58 Am. Rep. 724, commenting on the case of *Gayle v. Price*, 5 Rich. 525.

So, also, the husband's seisin may be shown to be subject to the lien of a purchase-money mortgage, and therefore not of such a character as will be sufficient to support the claim of dower as against such paramount right: *Crafts v. Crafts*, 2 McCord, 54. And the same doctrine applies where the inchoate right of dower is subordinate to the lien of a judgment recovered before the marriage: *Jones v. Miller*, 17 S. C. 380. Again, the rule is well settled that while a judgment against one of several tenants in common is a lien upon the undivided interest of such tenant in common, under which such undivided interest may be levied on and sold, yet such encumbrance is subordinate to the paramount right of the other tenants in common to demand partition; and if a sale of the undivided property is made for that purpose, the purchaser takes his title freed and discharged from such subordinate encumbrance on the share of the judgment debtor, and the creditor is remitted to his debtor's share of the proceeds of the sale, even though the judgment creditor is not a party to the proceedings for partition: *Keckelely v. Moore*, 2 Strob. Eq. 21; *Riley v. Gaines*, 14 S. C. 454; *Ketchin v. Patrick*, 32 S. C. 443. See also *Shiell v. Sloan*, 22 S. C. 157.

Now, while these are cases of liens or charges upon the common property, or rather upon the interests of one or more of the tenants in common, and while the inchoate right of dower may not, properly speaking, be a lien, yet the principle upon which they rest is applicable here, to wit, that the enforcement of a paramount right must not be interfered with or abridged by persons holding subordinate rights, whatever be their character. Hence, as the inchoate right of dower arises out of and is dependent upon the nature of the husband's seisin, such inchoate right must necessarily be affected with any infirmities of such seisin, and be qualified by any

paramount right subject to which it has been acquired; and where, as in this case, the husband's seisin was qualified by and subject to the paramount right of the other co-tenants to demand partition, the plaintiff's inchoate right of dower, growing out of and dependent upon such seisin, was subject to the same qualification. When, therefore, the seisin of the husband was divested by the exercise of the paramount right of the other co-tenants to demand partition, the inchoate right of dower was likewise destroyed, so far, at least, as the land was concerned, and the plaintiff was no more a necessary party for that purpose than is a judgment creditor of one of several tenants in common in case of a sale of the common property for partition: *Keckeley v. Moore*, 2 Strob. Eq. 21; where, as pointed out in the circuit decree, the point here involved, though not discussed, was practically decided.

The second question involves an inquiry as to the effect of the sale by Alfred Holley to Wise Holley of his undivided one half of the common property prior to the institution of the proceedings for partition, under which the land was sold to John Holley. It seems to us that the conveyance to Wise Holley placed him in the shoes of Alfred Holley, invested him with the same seisin, subject to the same qualifications, with which his grantor, Alfred Holley, had previously been invested, and made him a tenant in common with the other joint owners of the land. When, therefore, such seisin was divested by the sale for partition, the effect, so far as any subordinate right dependent upon such seisin was concerned, was the same as if the title and such seisin had remained in Alfred Holley. When the basis upon which the subordinate right of dower rested was destroyed by the exercise of a right paramount to the inchoate right of dower, such right necessarily fell with it, and could not be asserted against one claiming under a right paramount to it. We are therefore unable to see how the conveyance by Alfred Holley to Wise Holley could affect the question which we are called upon to determine.

The view taken by the circuit judge, that by reason of such sale the plaintiff's inchoate right of dower was not sufficiently represented in the proceedings for partition, does not seem to us to be sound, for we do not think it is a question of representation at all. If Alfred Holley had never sold and conveyed his undivided interest to Wise Holley, we would not be disposed to hold that the plaintiff's inchoate right of dower

was barred by the sale for partition, because though she was not a party to the partition proceedings, yet her interest was represented therein by her husband, who was a party. On the contrary, our view is, that such inchoate right of dower was defeated by the exercise of a right paramount to it; practically, that such inchoate right of dower in her husband's share of the common property was contingent upon the non-exercise of the paramount right to demand partition by a sale of the common property; but when such paramount right was exercised, the contingency upon which such subordinate inchoate right of dower rested could never happen, and hence it could never afterwards become absolute. Indeed, it would be anomalous to hold that the purchaser at a sale made under the exercise of a paramount right should take his title subject to one claiming under a subordinate right. Under this view we do not see how it is possible that the transfer by Alfred Holley of his interest to Wise Holley prior to the proceedings for partition can affect the question; nor do we see any necessity for making the plaintiff a party to the partition proceedings, for she then had no such interest in the property sought to be partitioned as rendered her a necessary party, in any sense of those terms, and since the sale she never could have any such interest.

The third question, under the view which we shall take of the fourth, becomes wholly unimportant, and as it is a mere question of fact, will not be considered.

The fourth question has been so fully and satisfactorily discussed by the circuit judge in his decree (which should be incorporated in the report of this case), that we find it very difficult to add anything to what is there so well said. It is there shown that the power of the former court of equity to order a sale of land for partition, owned by several tenants in common, either as distributees of an intestate's estate, or otherwise, is not derived from or dependent upon the provisions of the act of 1791, but existed and was exercised long before the passage of that act,—an instance of which will be found in the case of *Dinckle v. Timrod*, 1 Desaus. Eq. 109, decided in 1784, seven years before the passage of the act of 1791. This was expressly decided in the case of *Pell v. Ball*, 1 Rich. Eq. 361, and the doctrine was recognized in the subsequent cases of *Steedman v. Weeks*, 2 Strob. Eq. 145, 49 Am. Dec. 660, and *Gibson v. Marshall*, 5 Rich. Eq. 254. While, therefore, it may be true that the court of common pleas, deriving its power,

in this respect only, from the act of 1791, can only order a sale for partition in cases of intestacy, as has been held in the cases of *Crompton v. Ulmer*, 2 Nott & McC. 429, *Spann ad. Blocker*, 2 Nott & McC. 593, and *Barns v. Branch*, 3 McCord, 19, yet these decisions cannot affect, and do not purport to question, the long-established, and as we may say the universally recognized, powers of the court of equity in this respect, under which, as is said by Harper, C., in *Pell v. Ball*, 1 Rich. Eq. 361: "Titles have accrued and money has been paid and invested; thus involving, perhaps, the titles of a large portion of the property of the country." We would not feel at liberty, at this late day, to disturb or even question what may be called a rule of property so long established, even if we entertained much graver doubts than we do of the authority of the rule.

We concur, therefore, in the conclusion reached by the circuit judge as to this matter, that the power of the former court of equity to order a sale for partition is not confined to cases of intestacy, and that the inchoate right of dower of the wife of one of the several tenants in common is defeated by such a sale, even though such wife be not a party to the proceedings for partition. But as we differ with the circuit judge as to the effect of the transfer of Alfred Holley's interest to Wise Holley, as we have hereinbefore indicated, the judgments below must be reversed.

The judgment of this court is, that the judgment of the circuit court in each of the cases stated in the title be reversed, and that the complaints therein be dismissed.

DOWER — WHETHER EXTINGUISHED BY PARTITION — SALE AGAINST HUSBAND. — A sale of lands in partition proceedings is a judicial sale, and such sale of a husband's interest in land, in a proceeding to which he is a party, extinguishes the wife's right of dower therein, although she was not made a party to the proceeding: *Williams v. Wescott*, 77 Iowa, 332; 14 Am. St. Rep. 287; *Lee v. Lindell*, 22 Mo. 202; 64 Am. Dec. 262, and note; *Weaver v. Gregg*, 6 Ohio St. 547; 67 Am. Dec. 355, and note. See also *Ferry v. Robinson*, 25 Ind. 14; 87 Am. Dec. 346, and note.

EQUITY — JURISDICTION — PARTITION. — Courts of equity have exclusive jurisdiction of suits for the partition of personal property, even though the complainant's title is denied by the defendant: *Godfrey v. White*, 60 Mich. 443; 1 Am. St. Rep. 537, and note. *Contra*, see *Gudgell v. Mead*, 8 Mo. 53; 40 Am. Dec. 120, and note. A court of equity will decree partition of lands, if it is in possession of the co-tenants: *Weeks v. Weeks*, 5 Ired. Eq. 111; 47 Am. Dec. 358. See *Steedman v. Weeks*, 2 Stroob. Eq. 145; 49 Am. Dec. 660.

STATE v. JACKSON.

[35 SOUTH CAROLINA, 457.]

CONSTITUTIONAL LAW — CHARGE ON FACTS, WHAT IS NOT. — A judge does not charge on the facts, within the meaning of the constitutional inhibition, when he states to the jury only the points of evidence as to which there is no dispute, and leaves wholly to them the only disputed question of fact in the case, without the slightest intimation of his opinion as to that question.

MALICE IMPLIED FROM USE OF DEADLY WEAPON. — The law implies malice from the use of a deadly weapon, unless there are some circumstances of mitigation or excuse in the case.

ALIBI, PROOF OF, MUST BE CLEAR AND CONVINCING. — The evidence relied on to establish proof of an *alibi* must be sufficiently clear and convincing, to satisfy the jury that the preponderance of the evidence is in favor of the *alibi*; but it need not be sufficient to remove all reasonable doubt thereof.

INDICTMENT for murder. The facts are stated in the opinion.

C. G. Dantzler and J. B. McLaughlin, for the appellant.

Jervey, solicitor, *contra*.

McIVER, C. J. The defendant was indicted for and convicted of the crime of murder, in taking the life of one Nelson Hook. So far as we can perceive from the evidence set out in the case, there was not a shadow of testimony tending to show any excuse or provocation for firing the fatal shot which resulted in the instant death of the deceased; and the only disputed question of fact was, whether the defendant was the guilty party. Several witnesses testified positively and distinctly that the defendant fired the gun, and there was also testimony tending to show that defendant, looking upon the dead body of his victim, said, with an oath: "I have got one, and I am going to get another"; or as phrased by another witness: "I got that one." The only defense interposed was that of an *alibi*, and several witnesses testified that the defendant was at a place some two miles distant at the time when Hook was killed.

The jury having rendered a verdict of guilty, defendant appealed upon the grounds set out in the record. The first imputes error to his honor Judge Kershaw in violating the provisions of article 4, section 26, by charging upon the facts in the following particulars: 1. In saying to the jury: "The testimony in this case tends to show that this man Hook was killed on the occasion referred to, and that he was killed by

Toby Jackson, and there are no circumstances of mitigation or excuse." 2. "The evidence does not point to any one else; but that is immaterial." 3. "There is no pretense that there were any circumstances to excuse the killing." 4. "There is no pretense that there was any provocation." 5. "The proof tends to show that the killing was done with a deadly weapon; and under such circumstances the law implies malice, and the killing would be murder, unless there were some circumstances of justification or excuse in the case." The remaining ground, though stated as one of the specifications of the general charge of violating the constitutional provision above referred to, manifestly has no application to such charge, and will therefore be hereinafter separately stated and considered.

In view of the numerous cases in which this court has been called upon to consider the scope and effect of the constitutional provision which it is claimed has been violated in this case, it can scarcely be necessary for us to go over again the same ground, especially where it is only necessary to read the charge of the circuit judge as a connected whole (for which purpose it should be incorporated in the report of the case), to see that the imputation of error is utterly without foundation. There was not a shadow of dispute that the life of the deceased was taken with a deadly weapon, without the slightest pretense of any excuse or provocation, and the solitary disputed question of fact in the case was as to whether the testimony was sufficient to establish, beyond a reasonable doubt, that the defendant was the party who did the felonious deed. It is impossible to read the charge of his honor without perceiving that this question was left to the jury fully and fairly, without the slightest intimation of the judge's opinion as to that question. Indeed, it is not charged in any of the specifications that the judge expressed, or even intimated, any opinion as to that question. These specifications only point to the statement of undisputed facts, and this, as has been held, is no violation of the constitutional provision: *State v. Summers*, 19 S. C. 94; *State v. Nance*, 25 S. C. 173; *State v. Davis*, 27 S. C. 614; *State v. Murrell*, 33 S. C. 98.

There was, and could be, no dispute that there was testimony tending to show that the deceased was killed by the defendant; that there were no circumstances of mitigation, excuse, or provocation for the killing; that the killing was done with a deadly weapon, and there was, therefore, no error in stating these undisputed facts in the connection in which

they appear in the charge. It is likewise true that there was no evidence pointing to any one else as the author of the guilty deed, though the jury were very properly told, in that connection, "that is immaterial"; for the fact that the evidence did not show that any one else had done the deed would not be sufficient to fix guilt upon the defendant. Indeed, as we have said, the only issue of fact raised by the single defense interposed about which there was any dispute was fairly left to the jury, and there was certainly no error on the part of the circuit judge in simply repeating to the jury other facts appearing in the testimony as to which there was no dispute, or in saying to the jury that there was no evidence as to certain points mentioned.

It may be that the fifth specification was intended not only to designate an instance of a violation of the constitutional provision under consideration, but also to raise an independent legal question as to whether the law would imply malice from the use of a deadly weapon, unless there were some circumstances of mitigation or excuse in the case. If so, we can only say that the doctrine announced by the circuit judge has been too long and too well settled to require the citation of any authority to sustain it.

It only remains for us to consider the last ground of appeal, which is in these words: "Because his honor erred in charging the jury that 'the proof of an *alibi* must be clear and convincing, and must satisfy the jury, by the preponderance of the evidence, that the accused was not, at the time of the killing, at the place where the killing is said to have occurred.'" The point of this exception seems to rest upon the words "clear and convincing," used by the circuit judge to indicate the nature and degree of the proof necessary to establish the defense of *alibi*. We find, however, that Mr. Justice Foster, in his Crown Law, 368, said: "It must be admitted that mere *alibi* evidence lieth under a great and general prejudice, and ought to be heard with uncommon caution; but if it be founded in truth, it is the best negative evidence that can be offered; it is really positive evidence, which, in the nature of things, necessarily implieth a negative, and in many cases it is the only evidence that an innocent man can offer"; and this remark is quoted with approval in Phillips on Evidence, 249, in the second American from the third London edition. So, also, we find that in 1 Am. & Eng. Ency. of Law, 455, it is said: "Where the prosecution rests upon positive and undoubted

proof of the prisoner's guilt, it should not be overcome by less than full, clear, and satisfactory evidence of the alleged *alibi*."

In view of these authorities, we cannot say that the circuit judge erred in using the terms objected to as characterizing the nature and degree of evidence necessary to establish an *alibi*, especially when the jury were told, in that connection, as well as in other portions of the charge, that it was not necessary that the *alibi* should be proved beyond all reasonable doubt, but that a mere preponderance of evidence would be sufficient. Practically, the instruction amounted to this: that the evidence relied on to establish the *alibi* must be sufficiently clear and convincing, to satisfy the jury that the preponderance of the evidence was in favor of the *alibi*; but it need not be sufficient to remove all reasonable doubt of the fact that the defendant was not at the place where the homicide was committed at the time when it was committed. This, it seems to us, was substantially in conformity to the rule as established in this state by the cases cited in appellant's argument, to wit, that while the state, in a criminal case, is bound to prove every essential element of the charge made, beyond a reasonable doubt, the same degree of proof is not required of a defendant who sets up a special defense, which may be proved by a mere preponderance of the evidence; and if, upon the whole testimony, both on the part of the state and the defendant, the jury entertain a reasonable doubt as to any point material to the charge, the defendant is entitled to the benefit of such doubt.

The judgment of this court is, that the judgment of the circuit court be affirmed, and that the case be remanded to the court of general sessions for Orangeburg County, in order that a new day may be assigned for the execution of the sentence heretofore imposed.

MALICE — PRESUMPTION FROM USE OF DEADLY WEAPON. — Malice may be inferred from the use of a deadly weapon causing death, unless rebutted by other testimony: *State v. Lavelle*, 24 S. C. 120; 27 Am. St. Rep. 799, and note; note to *State v. Deschamps*, 21 Am. St. Rep. 399.

ALIBI — SUFFICIENCY OF EVIDENCE TO ESTABLISH. — A prisoner is not bound to prove an *alibi* beyond a reasonable doubt: *Landis v. State*, 70 Ga. 652; 48 Am. Rep. 588. A bare preponderance of evidence is sufficient to prove an *alibi*: *State v. Hardin*, 46 Iowa, 623; 26 Am. Rep. 174. If the evidence in support of an *alibi* is sufficient to raise a reasonable doubt in the mind of the jury, the accused is entitled to an acquittal: *Pollard v. State*, 53 Miss. 410; 24 Am. Rep. 703. See also extended note to *Sharp v. State*, 14 Am. St. Rep. 41.

TRIAL — INSTRUCTIONS — STATING EVIDENCE. — The court may state the testimony and declare the law, although it is erroneous to charge in respect to matters of fact: *People v. King*, 27 Cal. 507; 87 Am. Dec. 95, and note. The court may present the facts in his charge, but must inform the jury that they are the exclusive judges of the facts: *Horne v. State*, 1 Kan. 42; 81 Am. Dec. 499, and note.

SULLIVAN v. SHELL.

[26 SOUTH CAROLINA, 578.]

JUDGMENT — PROPER MODE OF PROCEEDING TO VACATE. — Where execution is renewed under proper proceedings after the judgment has been satisfied, if the defendant has any remedy, he must seek it by motion in the original cause, and not by a new and independent action.

RES JUDICATA — PARTY FAILING TO PRESENT DEFENSE ESTOPPED FROM DOING SO AFTERWARDS. — Where a defendant had an opportunity to plead payment of the judgment when summoned to show cause why the execution should not be renewed, but failed to do so, the order of renewal is *res judicata*.

RELIEF AGAINST JUDGMENT ON GROUND OF EXCUSABLE NEGLIGENCE. — Where a defendant duly served with summons, under no mistake as to the necessity of employing counsel, intrusts the copy summons to a friend, directing him to hand it to an attorney, with instructions to appear and plead payment, but it is not delivered to the attorney until after the time for answering had passed, and judgment by default was taken a year after, there is no such mistake, inadvertence, surprise, or excusable neglect as will entitle him to relief under section 195 of the code.

THE opinion states the case.

Featherstone & Son, for the appellant.

W. H. Irvine, contra.

McIVER, C. J. At the sale of the real estate of one M. A. Sullivan, under a bill to marshal the assets of his estate, the original plaintiff, Hewlett Sullivan, bid off a tract of land, and to secure the payment of the purchase-money executed his bond and mortgage on the same. This bond remaining unpaid, proceedings to foreclose the mortgage were instituted by the clerk of the court, who had succeeded to the possession of the bond and mortgage, and on the 21st of February, 1877, a judgment was rendered against said Hewlett Sullivan for upwards of four thousand dollars, and for the foreclosure of the mortgage and a sale of the mortgaged premises. No sale, however, was ever made under this judgment, Hewlett Sullivan claiming to have made sundry payments thereon, sufficient, as he alleged, to satisfy the same, but no satisfaction

was ever entered thereon. On the contrary, on the 17th of October, 1883, a summons to renew execution upon said judgment was served upon said Hewlett Sullivan, who handed it to his relative, J. D. Sullivan, with the request that he would deliver it to his attorneys, with instructions to plead payment of the judgment. The copy summons was not, however, delivered to said attorneys until twenty-four or twenty-five days after it had been served, but before the next succeeding term of the court.

No answer or demurrer to said summons and no notice of appearance was ever given; and on the 2d of December, 1884, more than a year after the service of the summons, an order of court was granted renewing said judgment, and granting leave to the present defendant, who had, in the mean time, succeeded to the office of clerk, to issue execution thereon. Accordingly, on the 12th of December, 1884, execution was issued for the balance claimed to be due, and on the 12th of March, 1885, this execution was levied upon the lands of said Hewlett Sullivan. Whereupon this action was commenced on the 23d of March, 1885, for the purpose of enjoining the enforcement of said execution, and having said judgment canceled and marked satisfied. The case, being at issue, was referred to the master, who made his report, recommending that the relief prayed for in the complaint be granted. To this report the defendant filed the several exceptions set out in the case, which were sustained by the circuit judge, and judgment rendered granting the prayer of the complaint. From this judgment defendant appeals upon the several grounds set out in the record.

Under the view which we take of this case, we do not deem it necessary to consider these grounds *seriatim*; for it seems to us that the recent case of *Crocker v. Allen*, 84 S. C. 452, 27 Am. St. Rep. 831, which has been recognized and affirmed in the still more recent case of *Gillam v. Arnold*, 35 S. C. 613, conclusively shows that the plaintiff is not entitled to maintain this action. If he ever had any remedy, it should have been sought by a motion in the cause in which the judgment complained of was rendered. But even if he had resorted to that mode of relief, we do not see how he could have successfully met the plea of *res adjudicata*. When he was served with the summons to show cause why the judgment should not be revived, and execution issued to enforce the same, he was afforded the opportunity to raise the very same questions

which he now seeks to raise by this action; and this court has repeatedly decided that one who fails to do so when afforded such opportunity is forever afterwards estopped from doing so: *Jackson v. Patrick*, 10 S. C. 197; *McNair v. Ingraham*, 21 S. C. 70; *Freer v. Tupper*, 21 S. C. 75; *Crenshaw v. Julian*, 26 S. C. 283; 4 Am. St. Rep. 719. As we said in the case last cited: "When these defendants were summoned to show cause why the judgment should not be revived and a new execution issued, that was the proper time to raise the question of the validity of the judgment, and though not in fact formally raised, must necessarily have been then adjudged; for until it was determined there was a valid judgment, of course there could properly be no order that the plaintiff should have execution thereof." And as was said in *McNair v. Ingraham*, 21 S. C. 70, and repeated in *Freer v. Tupper*, 21 S. C. 75: "The defense (payment) could have been made; indeed, the proceeding invited him to make it; and failing to do so, the result must be the same as if he had formally made it and failed." So here, we say that the very same grounds upon which plaintiff seeks to sustain this action could, and should, have been presented as defenses to the application to renew the judgment, and failing then to make them, the result must be the same as if they had then been urged and overruled.

It seems to be supposed that the plaintiff here was entitled to relief under the provisions of section 195 of the Code of Procedure. But passing by the fact that this does not purport to be a proceeding for relief under that section of the code, we do not think that the plaintiff has made such a case as is contemplated by that section. We see nothing in the pleadings or the evidence tending even to show that the judgment complained of was taken against him "through his mistake, inadvertence, surprise, or excusable neglect." The fact is undisputed, that he was regularly served with the summons, and he was under no mistake as to the necessity for employing counsel, for he appears immediately to have taken steps to do so. The fact that he did not himself deliver the copy summons to his attorneys, but intrusted that duty to another, who, for some reason wholly unexplained, neglected to do so until after the time for answering had expired, shows anything but excusable neglect; and when this is complied with, the further fact that it was more than twelve months after the summons was served before the order of re-

newal was granted, without a tittle of evidence tending to show that, in all that long interval, any effort whatever was made, either by the attorney or the client, to obtain leave to answer, or in fact any inquiry was made, or any attention paid to the matter, either by Hewlett Sullivan or his attorney, it would be little else than trifling with justice to hold that such conduct showed anything but the most inexcusable neglect, and most certainly does not show either inadvertence or surprise. How any mistake or negligence can be attributed to the attorneys of Hewlett Sullivan, we do not see, for they do not seem to have been spoken to upon the subject until after the time for answering had expired, and it does not appear that they were ever furnished with any facts upon which they could have based an application to the court for leave to answer after the time had expired. But even if there was negligence on the part of the attorneys, that would not help the case: See *Schroder v. Eason*, 2 Nott & McC. 291; *Foster v. Jones*, 1 McCord, 116; *Vaughan v. Hewitt*, 17 S. C. 442. In such a case the remedy is against the attorney, and not against the party who, by the negligence of the attorney, to which he did not contribute, has obtained the judgment.

It does not seem to us that, in any view, this action can be maintained, and therefore we have not deemed it necessary to go into the question, about which a good deal might be said, as to whether the judgment was ever in fact paid in full. It does appear from the calculation submitted by one of the counsel for the appellant, which we have verified, that even allowing all the credits claimed, there is still a balance due upon the judgment.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the complaint be dismissed.

JUDGMENTS—PROPER MODE OF PROCEEDING TO VACATE: *Crocker v. Allen*, 34 S. C. 452; 27 Am. St. Rep. 831, and note; note to *Morrill v. Morrill*, 23 Am. St. Rep. 104.

JUDGMENTS—RES JUDICATA: See note to *Gayer v. Parker*, 8 Am. St. Rep. 229; extended note to *Lea v. Lea*, 96 Am. Dec. 775. After judgment on a mortgage, neither the defendant nor his grantees will be permitted to prove payment of the mortgage before judgment: *Blythe v. Richards*, 10 Serg. & R. 261; 13 Am. Dec. 672. The record of a former recovery upon the same contract has the effect, when pleaded by way of estoppel, to prevent the defendant from denying that the plaintiff could recover according to the conditions of the contract: *Heichew v. Hamilton*, 4 G. Greene, 317; 61 Am. Dec. 122. A judgment unreversed estops a party against whom it has been

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rendered from proving any allegation inconsistent with it: *Dunlop v. Giddens*, 31 Me. 435; 52 Am. Dec. 625, and note. A judgment or decree of a court of competent jurisdiction is final, not only as to the subject-matter, but also as to every other matter which the parties might have litigated and had decided in the case: *Hentley v. Edden*, 46 Kan. 231; 26 Am. St. Rep. 91, and note with cases collected.

JUDGMENTS — RELIEF AGAINST, ON GROUND OF EXCUSABLE NEGLIGENCE: See note to *Williams v. Wescott*, 14 Am. St. Rep. 226; *Taylor v. Pope*, 106 N. C. 267; 19 Am. St. Rep. 530, and note. See also extended note to *Burnham Hays*, 53 Am. Dec. 282.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

IRISH v. NORTHERN PACIFIC RAILROAD COMPANY.

[4 WASHINGTON, 48.]

RAILROAD CONDUCTOR — RIGHT OF PASSENGER TO RELY ON DIRECTION OF, IN BOARDING TRAIN. — The conductor of a railroad train, in directing an intending passenger as to his method of getting upon the train, is acting within the scope of his authority as such conductor, and the passenger, in complying with his directions, is not guilty of negligence, unless he exposes himself to plain and apparent danger.

ACTION for personal injuries. The opinion states the case.

Marshall K. Snell and Stephen O'Brien, for the appellant.

Mitchell, Ashton, and Chapman, for the respondent.

HOYT, J. This action was brought to recover damages for personal injuries to the plaintiff, alleged to have been caused by the negligence of the respondent in the operation of a certain railroad train. The court below sustained the demurrer to the complaint, and from the judgment of dismissal rendered thereon plaintiff has brought the case here for review. The allegations of the complaint, so far as they are necessary for the consideration of the questions raised by this appeal, are as follows: "At that time it was the custom of the railroad company to run its trains from Wilkeson to the switch lying westwardly about one half mile, then switch off and run to Carbonado, upon another branch of railroad belonging to and operated by the defendant company, and returning thence to the said switch, would once more place itself upon the line running to South Prairie, and then on to Tacoma; that while stopping at said switch it was the practice of the officers and

employees of said company employed upon said train to permit and request intending passengers to board the cars, and this practice had become a custom among the people of Wilkeson, and was well known; that plaintiff knew this practice and custom, so, when he found the train moving away from Wilkeson station without him, he shouldered his bundle and walked down the railroad to the switch aforesaid, and there awaited the return of the train from Carbonado; that in due time the train returned from Carbonado and approached said switch, the engine and tender coming first, crossing the switch, and running up a short distance toward Wilkeson station, thence running westwardly upon the line of road toward South Prairie and stopping; the passenger-car, the only car, came after, propelled by its own gravity, and in like manner ran over said switch and a short distance towards Wilkeson, and stopped; that when the car stopped, the conductor of said train, being an employee of said defendant company, and the brakeman of said train, also an employee of said defendant, appeared upon the rear platform of said car; that plaintiff at that time was standing on a steep bank forming the bed of the railroad, about ten feet away from the rails, and to the side thereof, where he had gone to be out of the way when said train came down from Carbonado and switched off to the line to South Prairie; that when the conductor upon said car saw the plaintiff, who expressed his desire of getting on board said car, the said conductor, being an employee of said defendant company, beckoned to the plaintiff to come to the rear of the car, and directed him to come between the rails of said railroad, and to the rear end of said car, and by his words and gestures indicated to plaintiff that he should place his baggage upon the platform of said car at a point immediately above the couplers, and between the upright iron guards at the end of the platform, and a part of said car; said conductor saying to said plaintiff, in order to induce him to make haste, 'This way, now; hurry up,' pointing with his hands where he desired plaintiff to come to and place his baggage, on the rear platform, as above stated; that plaintiff, in obedience to the instructions of said conductor, and following the commands given by him as to the manner in which he should place his baggage on board said car, believing himself to be obliged to obey the directions of the conductor in getting on said car, fully believing that said conductor had full control of all the movements of said train, and that no move-

ment of said car would be made without the orders and directions of said conductor, and for the further reason that the bank upon which the car stopped was so steep, and the steps of the platform so slippery from frost, that plaintiff could not put his bundle on the car by the steps of the platform, and fully believing that it would be safe to follow the instructions of the conductor as aforesaid, and neither hearing nor seeing anything that would indicate that the engine was moving, did go upon the track of said railroad, with his bundle of baggage upon his shoulder, and did approach the rear platform of said car, in the manner indicated and directed by the said conductor, and attempted to place his bundle upon said platform, in the doing of which said conductor assisted him by taking hold of his bundle; that while standing in this position, the car of which said platform was a part, through the negligence and carelessness of the conductor and engineer of said train, they being then employees of defendant company, received a sudden shock from the engine standing in front of said car, and, without any warning whatever, moved backward at a rapid rate, and struck the plaintiff and gave him a severe blow upon his chest, and knocked him down between the rails of said railroad, and pushed him along upon the bed of said railroad between the rails and upon the ties, for a distance of thirty feet or thereabouts, to the great physical injury of the plaintiff."

The respondent urges that for two reasons they are insufficient to show a cause of action: 1. The negligence of the defendant is not sufficiently alleged; and 2. That from such allegations it appears that plaintiff's own acts contributed to the injury. The first question above stated, though incidentally mentioned, was not insisted upon with much force by the respondent, and we do not think it necessary to say more in regard thereto than that we think that, as against a general demurrer, the negligence of the defendant is sufficiently alleged.

The other question has been argued by the respective parties at great length and with much ability, and we have investigated with care the authorities cited thereon. In addition to the points and authorities bearing directly upon this question, counsel have presented authorities upon certain features of the case bearing more or less directly thereon. But in view of the decisions of this court in this class of cases, it will not be necessary for us to refer to them. In this state, as in the great majority of the states of the Union, it is settled

law that a party cannot recover damages for injuries to which his own negligent acts have contributed. The question, then, in this case is as to whether or not the acts set out, as above stated, show that the appellant contributed to the injury of which he complains. It is not necessary that it should appear from his complaint that he was not guilty of contributory negligence, as under the great weight of authority such contributory negligence is matter of defense. Do the acts of the plaintiff above stated show him to have been guilty of such negligence as will bar his recovery? It may be conceded that if he had attempted to get upon this train in the manner which he did, without any action or invitation from those in charge of the train, that negligence would be presumed, as the manner of his making such attempt was an unusual one, and ordinarily attended with some danger.

Respondent first contends that plaintiff had no business to attempt to get upon the car at the place where it was standing, as such place was not a depot at which travelers were expected to get off and on the car. But even if this contention were warranted by the statements of the complaint, it might be questionable whether such fact could avail defendant, in the light of the statement that there was an express invitation by the conductor of the train that the plaintiff should board the car then and there. We think, however, that the statements of the complaint are sufficient to show that, for the purposes of this action, the place where the car stood should be held a proper one for the reception of passengers. The allegations of the complaint show such a practice in regard to getting on and off trains at this point, and such knowledge and consent thereto by the officers of the company, as to estop the defendant from now objecting to such practice.

The real questions upon which this case must turn are: 1. The extent of the right of an intending passenger to rely upon the direction of the conductor of the train in getting thereon; and 2. What, if any, was the danger apparent to plaintiff of such attempt to obey the instructions of said conductor. Upon this first question the authorities are not entirely uniform, and it is difficult to harmonize the expressions of the courts of the different states, or even of the same state, in regard thereto. There is a line of cases which have adopted the extreme doctrine that a passenger upon a train is justified in obeying the direction of the conductor or other persons in charge thereof, regardless of any question of appar-

ent danger in so doing, and if injured while in a situation to which the invitation or direction of such conductor or other persons has placed him, he can recover therefor: See *Hanson v. Mansfield R'y etc. Co.*, 38 La. Ann. 111; 58 Am. Rep. 162. We are not prepared to go the extent of these cases. In our judgment, the proper rule, upon principle and authority, is, that the direction or invitation of the conductor or other person, within the scope of his authority, justify the passenger in complying therewith, unless by so doing he will expose himself to danger, plainly open to his observation, that a prudent man would not incur, but that he cannot, except at his own peril, obey such direction or invitation, when to do so would expose him to plain and apparent danger: See *Cincinnati etc. R. R. Co. v. Carper*, 112 Ind. 26; 2 Am. St. Rep. 144; *Jeffersonville R. R. Co. v. Swift*, 26 Ind. 459; *St. Louis etc. R. R. Co. v. Cantrell*, 37 Ark. 519; 40 Am. Rep. 105; *Fowler v. Baltimore etc. R. R. Co.*, 18 W. Va. 579.

Applying this rule to the facts stated in the complaint, we think that they show that plaintiff was justified in complying with the direction of the conductor in attempting to board the car as stated in the complaint. We think it clear that any direction of a conductor of a train to an intending passenger, as to his method of getting upon such train, is clearly within the scope of his authority as such conductor. This being so, it follows that plaintiff was justified, unless in complying with such direction he exposed himself to open and apparent danger. If he had not had such direction from the conductor, it would have been his duty to have ascertained for himself whether or not danger would be incurred in this attempt to get upon the car, or at least to have taken such precaution to ascertain the danger as a prudent man would have done under all the circumstances, but in obeying such direction he had a right to assume that the conductor knew what he was doing in giving it, and that the train would be so managed and controlled by him as to make his compliance therewith perfectly safe; and having a right to rely upon this presumption, he was not called upon to look out for evidence of danger, but had a right to act upon such invitation or direction, unless the danger so presented itself that a man of ordinary prudence could not avoid seeing it. We do not think the danger of getting upon the car in the manner indicated by the conductor was of this character. If the car remained standing, there would be no danger at all in getting upon it in

the way proposed, and the fact that it would not thus remain standing would not necessarily be made known to him, and under the allegations of this complaint was not in fact known to him. Taking the allegations of the complaint as true, such contributory negligence of the plaintiff as will defeat his recovery does not appear.

The judgment must be reversed, and the cause remanded for further proceedings.

RAILROADS—NEGLIGENCE.—OBEYING INSTRUCTIONS OF CONDUCTOR NOT CONTRIBUTORY NEGLIGENCE: *Cincinnati etc. R. R. Co. v. Carper*, 112 Ind. 26; 2 Am. St. Rep. 144, and note; *Detroit etc. R. R. Co. v. Curtis*, 23 Wis. 152; 99 Am. Dec. 141, and note; *Hanson v. Mansfield R'y etc. Co.*, 38 La. Ann. 111; 58 Am. Rep. 162. It is negligence on the part of a conductor of a railroad train to advise a passenger to leave a moving train, under circumstances likely to expose him to injury: *Jones v. Chicago etc. R'y Co.*, 42 Minn. 183; *St. Louis etc. R. R. Co. v. Cantrell*, 37 Ark. 519; 40 Am. Rep. 105, and note. Where a person was directed by the conductor of a moving train to go to a forward car, where he could get a seat, and in passing from one car to another he was jostled from the car by a brakeman, either purposely or carelessly, the defendant was held liable: *Louisville etc. R. R. Co. v. Kelly*, 92 Ind. 371; 47 Am. Rep. 149. See *Avey v. Galveston etc. R'y Co.*, 81 Tex. 243; 26 Am. St. Rep. 806.

STATE v. BREW.

[4 WASHINGTON, 35.]

LARCENY, INDICTMENT FOR, SUFFICIENT WITHOUT ALLEGING VALUE OF EACH SEPARATE ARTICLE STOLEN.—An information or indictment which charges the larceny of several articles need not necessarily allege the value of each separate article charged to have been stolen.

INFORMATION for larceny. The opinion states the case.

Robertson and Jennings, for the appellant.

R. E. Moody, prosecuting attorney, and *James A. Haight*, for the state.

DUNBAR, J. The only question that can be considered by the court in this case is the sufficiency of the indictment. No statement of facts has been settled or certified, and a certificate of the clerk of what occurred at the trial could not be notice to this court. The office of a statement of facts is to bring to the notice of this court the very questions sought to be brought to its notice by the certificate of the clerk. In this case, the indictment, in substance, charges the crime of grand larceny, committed by stealing a lot of carpenter tools,

respectively described, and estimated to have a lump value of fifty dollars; and it is contended by appellant that the indictment does not state facts sufficient to charge the appellant with crime under the laws of this state; but that it is necessary to allege the value of each separate article or thing charged to have been stolen. We think the extent to which the courts have gone on this proposition is, that where a lump value is given, and the proofs show that only a part of the articles alleged to have been stolen was stolen, the variance is fatal. It is true that it is stated as a general rule in section 206 of Wharton's Criminal Pleading and Practice that "when, as in larceny or receiving stolen goods, personal chattels are the subject of an offense, they must be described specifically by the names usually appropriated to them, and the number and value of each species or particular kind of goods stated." But it is evident from the whole text, and cases cited to sustain the proposition, that it is stated only with reference to a question of variance between the indictment and the proof; for the learned author refers to Wharton's Criminal Evidence, sections 121-126, which treat exclusively of the variance between the indictment and the proof; and the sufficiency of the indictment to charge a crime is not discussed at all. As to *People v. Coon*, 45 Cal. 672, cited by Wharton, it was decided that where the indictment charged the defendant with stealing five certificates of shares of stock of a certain number, and the proof showed there was but one such certificate, there was a fatal variance. So in *Hope v. Commonwealth*, 9 Met. 134, cited by the appellant, while the court states that the well-settled practice has been that of stating in the indictment the value of the articles alleged to have been stolen, the opinion, as a whole, shows conclusively that the application was to a question of variance; for the question decided is shown by the concluding language of the opinion, which is as follows: "Our statutes, it will be remembered, prescribe the punishment for larceny with reference to the value of the property stolen; and for this reason, as well as because it is in conformity with long-established practice, the court are of the opinion that the value of the property alleged to be stolen must be set forth in the indictment, and that where an indictment alleges a larceny in various articles, and adds only the collective value of the whole, such allegation is not sufficient, where the defendant is not found guilty of the larceny as to the whole. The plain inference is,

that the allegation would have been sufficient if the defendant had been found guilty of the larceny as to all the articles; or in other words, that the allegations were sufficient to charge a crime. In *McCarty v. State*, 1 Wash. 377, 22 Am. St. Rep. 152, the general proposition was stated, that the value of each ticket should have been alleged; but the main proposition decided, as shown by the authorities cited, was, that the information should have shown that they were genuine, effective tickets, and that unstamped, undated, and unsigned railroad tickets were not the subject of larceny.

It is stated in 2 Bishop's Criminal Procedure, section 714, "that the ordinary and practically best form of the allegation is to add the value of each specific article"; and this, the author says, is necessary, so that if one is inadequately laid, or is not proved, the averment as to it alone may be rejected; but adds that in strict law, looking to the indictment alone, there is no objection to stating simply an aggregate value of the whole. The same doctrine is announced in *State v. Hart*, 29 Iowa, 268; *State v. Murphy*, 8 Blackf. 498; *State v. Beatty*, 90 Mo. 143; *State v. Buck*, 46 Me. 531; 12 Am. & Eng. Ency. of Law, 818; *State v. Hood*, 51 Me. 363; *Meyer v. State*, 4 Tex. App. 121. In fact, the overwhelming weight of authority sustains this view. We think there is nothing in the contention that the information is bad for duplicity.

The judgment of the lower court is therefore affirmed.

LARCENY — INDICTMENT — ALLEGING VALUE OF SEPARATE ARTICLES STOLEN. — The number of bank bills stolen need not be alleged in the indictment. If their amount is given, it is sufficient: *Commonwealth v. Grimes*, 10 Gray, 470; 71 Am. Dec. 666, and note; note to *State v. Segermond*, 10 Am. St. Rep. 174; *State v. Henshaw*, 3 Wash. 12. But an indictment for grand larceny, charging the taking of ninety-three railroad tickets, of an aggregate value, without alleging the value of each ticket, or that they were stamped, dated, signed, and genuine, is insufficient: *McCarty v. State*, 1 Wash. 377; 22 Am. St. Rep. 152, and note with cases collected.

JOHNSON v. GREGORY & Co.

[4 WASHINGTON, 100.]

FALSE RETURN OF SHERIFF AVAILABLE IN DIRECT PROCEEDING TO SET ASIDE JUDGMENT. — A defendant against whom a judgment by default has been rendered upon a false return by the sheriff of service of summons upon him, and whose property has been sold under an execution issued upon such judgment, may assail such return in an action brought to set aside the judgment and sale, without proceeding directly against the officer for damages.

ACTION to set aside a judgment and sale. The opinion states the case.

White and Munday, for the appellant.

John Arthur and J. W. Spriggs, for the respondents.

DUNBAR, J. On the tenth day of June, 1890, respondents brought an action against appellant in the superior court of King County, for the sum of \$1,196.75, alleged to be due on an unbalanced account, together with interest at the rate of ten per cent per annum from May 17, 1890. Summons was issued, and in due time returned and filed in the office of the clerk of the court, having indorsed thereon the return of the sheriff, to the effect that said summons had been personally served on the defendant, Thomas Johnson, plaintiff herein, on a day specified. The time for answering having expired, the default of the defendant, Johnson, was ordered entered by the court, and thereupon judgment was rendered and entered by the court in favor of H. P. Gregory & Co. against said Thomas Johnson for \$1,211.70, and costs of suit. Execution was issued on said judgment, and the lots of land described in the complaint were levied upon thereunder and sold, the plaintiffs in the action becoming the purchasers; and Johnson brings this action, asking that said judgment of default, and all subsequent proceedings in the action, be declared illegal and void and of no effect, for the reason that the sheriff's return was false, in that he was never served with summons, and had no notice of the suit whatever, and that he did not know of the judgment, or any proceedings thereunder, until after the sale of said land; alleging that he did not owe all of the amount claimed, and that the judgment which plaintiffs, H. P. Gregory & Co., would obtain against him in the trial of the cause would be less than the judgment heretofore obtained; and claiming a right to select and claim the lands

sold as a homestead, under the exemption laws of this state. To this complaint the respondents interposed a demurrer, that it did not state facts sufficient to constitute a cause of action. Demurrer was sustained, and the appellant, relying on his complaint, comes to this court. This case raises squarely the question whether or not, in this kind of an action, a return of the sheriff can be assailed and judgment and sale set aside, the appellant contending that the jurisdiction of a court of equity to relieve against a judgment pronounced without service of process is well established, and respondents contending that the return of the officer imports absolute verity, and that when it shows a regular and proper service it cannot be traversed or impeached, except in a direct proceeding in which the sheriff is made a party.

Upon this question there is, without doubt, a very great conflict of authority, the courts of different states having established different rules, in conformity with their respective ideas of the best manner of subserving public policy and protecting private rights. In this opinion we will not essay a review or analysis of the cases reported on this question, all of which that were available we have examined, and many of which are exceedingly interesting, but will refer to Herman on Estoppel, 197, 198, 539-546, inclusive, where the author stoutly maintains the doctrine that public policy demands the upholding of execution sales, and urges with great cogency that if it were otherwise parties could not be induced to purchase, and that the rule is necessary to secure the rights of parties and give validity and effect to the acts of ministerial officers, and that parties injured by such return can obtain redress only by an action against the officer for false return.

The subject is exhaustively argued by the author and authorities collated, including *Walker v. Robbins*, 14 How. 584, which is one of the main cases relied upon by the author to sustain his contention, although in that case the supreme court of the United States drew a distinction between cases where the plaintiff, at law, was not in fault, and cases where the plaintiff had done something to connect him with or make him responsible for the false return; though it is difficult to see why this fact should be allowed to affect the rights of the defendant to the action, if, as a matter of fact, he had not been served with process, and had no notice of the trial of the cause. In support of the proposition that the want of service of process may be shown in equity in opposition to

the statement on the judgment roll, we cite Freeman on Judgments, sec. 495, and cases cited; *Taylor v. Lewis*, 19 Am. Dec. 137, note; and note to *Oliver v. Pray*, 19 Am. Dec. 603-612. These notes by the author contain an exhaustive compilation and review of the authorities *pro* and *con*, and we are convinced from their examination that the great weight at least of modern authority sustains the view that the return of the officer may be assailed in a direct proceeding to set aside the judgment, in addition to defendant's right to proceed against the officer for damages. And this view of the law appeals to our judgment as being founded on the better reasoning. No doubt hardships will arise under such a construction of the law, and public policy demands that credence should be given to the record; but prudential considerations of public policy must not be carried to the extent of establishing conclusive presumptions which destroy the citizen's constitutional right to his day in court. No greater hardship could certainly be conceived of than to deprive a person of his property without due process of law, and no principle is more antagonistic to our form of government and system of laws, or to the provisions of our constitution. In this case, if the allegations of the complaint are true, the plaintiff has been deprived of his property without due process of law, and it is cold comfort to him to be informed that though he must satisfy a judgment which he never had an opportunity to contest, and that he and his family must be turned out of a home which the law would allow them to retain as a homestead, that he has a remedy against the officer who made the false return.

It was said by the supreme court of Tennessee, in *Ridgeway v. Bank of Tennessee*, 11 Humph. 523, that "the action for false return is an inadequate remedy for such an injury; for it might be that after a ruinous sacrifice suffered in the payment of a judgment so recovered, and the delay and expense of litigation with the officer who made the false return, he might be unable to make the proper indemnity, or succeed in evading his liability." Of course, the presumption is, that the return of the officer is correct, and the proof of its falsity should be clear and convincing, but it is going too far to hold that such presumption is absolutely conclusive.

The judgment will be reversed, and the defendant given an opportunity to answer.

JUDGMENT RENDERED WITHOUT SERVICE OF PROCESS — ACTION TO SET ASIDE. — Relief against a judgment rendered against a party without service of summons is by motion in the original cause: *Orocker v. Allen*, 34 S. O. 452; 27 Am. St. Rep. 831, and note; note to *Morrill v. Morrill*, 23 Am. St. Rep. 117. And an execution issued under a void judgment is absolutely void, and may be attacked collaterally as well as directly: *Olsen v. Nussally*, 47 Kan. 391; 27 Am. St. Rep. 296, and note. An action may be maintained to set aside a judgment rendered by a court which had obtained no jurisdiction from want of service of process: *Magin v. Lamb*, 43 Minn. 80; 19 Am. St. Rep. 216; *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448, and note; *Dobbins v. McNamara*, 113 Ind. 54; 3 Am. St. Rep. 628. See extended note to *Oliver v. Pray*, 19 Am. Dec. 603, and especially extended note to *Taylor v. Lewis*, 19 Am. Dec. 137.

SHOUFE v. GRIFFITHS.

[4 WASHINGTON, 161.]

EQUITABLE TITLE TO LAND IN PARTY WHO PAYS ACTUAL PURCHASE PRICE WHEN. — Where one member of a syndicate purchases land for the syndicate, and falsely represents to the other members thereof that the purchase price is more than it actually is, and that he is paying for a proportionate interest in the land, while in fact the other members of the syndicate pay the whole price, the equitable title to the land is in the parties who have paid the actual purchase price.

BONA FIDE PURCHASER, DOCTRINE OF, APPLICABLE TO PURCHASER OF LEGAL TITLE ONLY. — The doctrine which protects a *bona fide* purchaser without notice is applicable solely to purchasers of a legal title; the purchaser of an equitable interest purchases at his peril, and acquires the property burdened with every prior equity charged upon it. Where, therefore, a party, having, at most, an equitable estate in lands the legal title to which is in a trustee for a syndicate, mortgages such lands, the mortgage is void.

ESTOPPEL — ACTUAL OWNERS OF LAND NOT ESTOPPED FROM ASSERTING THEIR RIGHTS WHEN. — Although a declaration of trust made and recorded by the members of a syndicate formed for the purchase of lands declares that a certain interest in such lands belongs to a party who has made false representations to them, yet where such declaration was made in ignorance, which was not chargeable to neglect, and the person to whom the party who made the false representations mortgaged the lands had no knowledge of the execution of the declaration, the actual owners of the lands are not estopped from asserting their rights thereto.

ACTION brought by John Shoufe and Hugh McCrum, under the name of Shoufe and McCrum, against H. H. Griffiths and M. L. Abbott, doing business under the name of Abbott and Griffiths, William B. Robertson, Minda S. Graff, Hannah Kistenmacher, Alice J. Roberts, G. W. Traverse, and Thomas B. Hardin, to foreclose a mortgage on the alleged undivided two-thirds interest of Abbott and Griffiths in certain real es-

tate. The mortgage was executed to George H. Bell, and by him assigned to Shoufe and McCrum. Abbott and Griffiths held a bond for a deed from John Krumm and wife, conditioned for a conveyance of certain land for five thousand five hundred dollars, reciting that Abbott and Griffiths had paid the obligors, on the date of the bond, two thousand five hundred dollars, and that thirteen hundred dollars in money was to be paid at the time of the conveyance, and two mortgages given by Krumm as security for seventeen hundred dollars to be assumed by the grantees. The actual price was \$3,550, of which \$500 was paid when the bond was executed, and the balance was to be paid in cash and by the assumption of the two mortgages for \$1,700, upon the execution of the deed. Abbott and Griffiths organized a syndicate for the purchase of the land, composed of the following persons: M. L. Abbott H. H. Griffiths, G. W. Traverse, and Minda S. Graff, each holding a one-fifth interest, and Alice J. Roberts and Hannah Kistenmacher jointly holding a one-fifth interest. According to the price alleged by Abbott and Griffiths, the syndicate had to contribute three thousand eight hundred dollars in cash. Alice J. Roberts and Hannah Kistenmacher jointly contributed \$740, and Minda S. Graff and G. W. Traverse each contributed \$740. As the actual cash required for the purchase was only \$1,850, they had contributed an excess of \$470, which sum Abbott and Griffiths, who were conducting other negotiations, appropriated. Abbott and Griffiths had represented that the agreed price was \$5,500, and that they were contributing \$740 each, which, with \$100 realized from a sale of a portion of the land and applied on the purchase price, made the sum of \$3,800. The land was deeded H. H. Griffiths and Minda S. Graff, trustees. Subsequent to the conveyance, Abbott and Griffiths executed a mortgage to George H. Bell, on an undivided two fifths of said land, to secure certain notes which were assigned by Bell to Shoufe and McCrum. The superior court made a decree declaring the mortgage no lien upon the property, and finding that the title to said property is in Minda S. Graff, an undivided one third; G. W. Traverse, an undivided one third; and Alice J. Roberts and Hannah Kistenmacher, an undivided one third. The plaintiffs appealed. Other facts appear from the opinion.

Tustin, Gearin, and Crews, for the appellants.

Fishback, Hardin, and Meek, for the respondents.

SCOTT, J. It is contended by the appellants that the land in question was sold to Abbott and Griffiths by Krumm and wife, and was by Abbott and Griffiths sold to the syndicate of which they were members. The fact that the preliminary negotiations for the purchase had been conducted by Abbott and Griffiths, and that the bond given by Krumm and wife ran to them, lends some color to this claim. But from an examination of the whole proof, as well as of the syndicate agreement itself, we are led to the conclusion that the purchase was made by the syndicate direct from Krumm and wife, and that this was the understanding of the members of the syndicate as between themselves, and was the fair intentment to be drawn from all their dealings. It clearly appears that the members of the syndicate were to engage in the enterprise upon an equal footing, according to the representations of Abbott and Griffiths, and appellants' contention that the facts in this case are not such as will warrant the granting of any relief to the respondents, Graff, Kistenmacher, Roberts, and Traverse, is untenable. The fact that the land was worth all that Abbott and Griffiths falsely represented to be the purchase price does not alter the case, for the difference between the actual purchase price paid to Krumm and wife, and the price represented by Abbott and Griffiths to have been paid or agreed upon, resulted in a direct loss to the other members of the syndicate in the proportion paid by each. They could have bought the land just that much cheaper, and their profits in case of a sale for an enhanced price would have been just that much more. It is true that the other members of the syndicate relied upon the representations of Abbott and Griffiths as to the value of the land, but they also relied upon the further fact, as they supposed and were induced to believe, that Abbott and Griffiths were substantiating their representations as to the value of this land by an investment of their own money to the same extent proportionately as that contributed by the other members of the syndicate; and it is not at all likely they would have engaged in the enterprise on the terms they did engage in it had they known the true inwardness of the transaction. While all willful, false representations resulting in loss or damage will not afford a basis for a recovery, the foundation here is sufficient. The aim of the law is to grant relief in all such cases where possible, and the law will not look with favor on a party who flippantly admits having made false representations to another, thereby

inducing him to act in a certain way, but who insists there is no remedy. There is a legal distinction, if not a moral one, between the facts of this case and of one where a party in selling a piece of property as his own to one who understands he is buying it from such party, falsely represents that he paid more than he really did pay for it. In this case these respondents were induced to pay the full purchase price for the land, and to allow Abbott and Griffiths a two-fifths interest therein by reason of the representations of Abbott and Griffiths that they were contributing a proportionately equal amount. The respondents aforesaid were induced to pay that much more for their respective interests than they otherwise would have paid. In *Crater v. Binninger*, 33 N. J. L. 513, 97 Am. Dec. 737, a recovery was permitted under very similar circumstances.

Appellants further contend that they stand in the position of *bona fide* encumbrancers without notice. This does not avail them anything. The most which the mortgage could encumber was an equitable estate in Abbott and Griffiths. The doctrine which protects *bona fide* purchasers without notice is applicable solely to purchasers of a legal title; and the purchaser of an equitable interest purchases at his peril, and acquires the property burdened with every prior equity charged upon it: *Shirras v. Caig*, 7 Cranch, 34; *Vattier v. Hinde*, 7 Pet. 252; *Boone v. Chiles*, 10 Pet. 177. They had notice that Griffiths and Minda S. Graff held the legal title to the land as trustees for the benefit of the syndicate.

It is further urged that these respondents are estopped from asserting their rights, in consequence of the declaration of trust made by them, which represented Abbott and Griffiths as the owners of a two-fifths interest in the land. But it seems to us that this claim is wanting in several essentials. In the first place, it appears that when this declaration was made the respondents, Graff, Kistenmacher, Roberts, and Traverse were ignorant of their rights in the premises, which ignorance was not chargeable to their neglect. While the declaration was made and recorded prior to the execution of appellants' mortgage by Abbott and Griffiths, it does not appear that Bell, the mortgagee, nor his assignees, the appellants, had any knowledge of its existence. If they had no such knowledge, they cannot well claim they were misled by its contents. The doctrine of constructive notice cannot be invoked in their favor, and, in any event, if they did know of

it, or if such representations were made to them personally, it would be necessary for them to show that by reason thereof they were induced to take the mortgage, and there is no such proof in the record. In support of the above propositions, see *Whitaker v. Williams*, 20 Conn. 98; *Preston v. Mann*, 25 Conn. 118; *Danforth v. Adams*, 29 Conn. 107; *Boggs v. Merced M. Co.*, 14 Cal. 366; *Davis v. Davis*, 26 Cal. 41; 85 Am. Dec. 157; *Fletcher v. Holmes*, 25 Ind. 469; *Long v. Anderson*, 62 Ind. 537; *Greensburgh etc. Turnpike Co. v. Sidener*, 40 Ind. 424.

The judgment of the superior court is affirmed.

TRUSTS — RESULTING, WHEN ARISE. — If real property is purchased, and the conveyance is taken in the name of one person, while the purchase price is paid by another, a resulting trust arises in favor of the person paying the purchase price: *Champlin v. Champlin*, 136 Ill. 309; 29 Am. St. Rep. 323, and note, in which all the cases discussing this subject are collected. See extended note to *Neill v. Keese*, 51 Am. Dec. 751.

VENDOR AND PURCHASER — BONA FIDE PURCHASER — DOCTRINE APPLICABLE TO PURCHASER OF LEGAL TITLE ONLY. — A purchaser means one who has acquired the legal title: *Gipin v. Davis*, 2 Bibb, 416; 5 Am. Dec. 622. The purchaser of an equitable title takes it subject to all equities, though he purchases it *bona fide*, for a valuable consideration, and without notice thereof: *York v. McNutt*, 16 Tex. 13; 67 Am. Dec. 607, and note; *Polk v. Gallant*, 2 Dev. & B. Eq. 395; 34 Am. Dec. 410, and note; *Craig v. Leiper*, 2 Yerg. 193; 24 Am. Dec. 479, and note; extended note to *Walton v. Hargroves*, 97 Am. Dec. 433.

PRIGNON v. DAUSSAT.

[4 WASHINGTON, 199.]

DELIVERY OF DEED BY AGENT OF GRANTOR VALID WHEN. — Where a deed is drawn up by the grantee, and sent to the grantor to be executed with directions to record it, the recording officer, when the deed is delivered to him pursuant to such directions, becomes the agent of the grantee, and such delivery gives the deed full force.

CONTRACT OF MARRIAGE VALUABLE CONSIDERATION FOR DEED, AND NEED NOT BE IN WRITING WHEN. — A contract of marriage is not only a good, but also a valuable consideration for a deed. And where a deed recites that the consideration thereof is the promise of the grantee to marry the grantor, and is drafted by the grantee, and sent to the grantor for execution, it is not necessary, in order to render the consideration sufficient, that there should be a written memorandum of the contract of marriage signed by the grantee.

DEED, VALIDITY OF, NOT AFFECTED BY ANYTHING THAT MAY HAPPEN AFTER ITS EXECUTION. — When a deed is executed upon a good and valid consideration, the transaction is complete, and the deed will be unaffected by anything that may happen thereafter. Where, therefore, a grantee, at the time of the execution of a deed to her, in consideration of her promise to marry the grantor, is unaware of the intention of the

grantor to defraud his creditors, the fact that she becomes aware of such fraudulent intent before she complies with her contract of marriage is not sufficient to avoid the deed, since the consideration for the deed is the agreement to marry, and not its actual consummation.

ACTION to set aside a deed. The opinion states the case.

Tustin, Gearin, and Crews, for the appellant.

Brady and Schaefer, for the respondents.

Hoyt, J. This action was brought by appellant to set aside a deed made by the respondent L. P. Daussat to the other respondent. It is conceded that the grantee had no knowledge that the grantor was indebted to any one until long after the execution and recording of the deed, and that the deed in her hands, if otherwise supported, cannot be affected by any fraudulent intent which may have moved the grantor to the making of the same. Appellant, however, attacks the deed upon two grounds: 1. That it was never delivered to the grantee; and 2. That it was purely voluntary, being supported by no consideration whatever.

As to the first question, the conceded facts show that in accordance with a prior arrangement with the grantor, the grantee caused the deed to be prepared, and sent to the grantor with instructions for him to execute the same and have it recorded immediately. Under these circumstances, was the delivery to the auditor for record a delivery to the grantee? Many cases have been cited by the appellant to show that a delivery to a third person without the knowledge or direction of the grantee is not a good delivery, and for the purposes of this case this may be conceded to be the law. We have examined all the cases cited by the appellant, and fail to find a single one among them that goes further than we have above indicated. In the case at bar, however, there was not only a delivery by the grantor to the auditor under such circumstances as clearly showed his intent to give the instrument force, but such delivery was in compliance with the prior instructions of the grantee, and under these circumstances, for the purposes of such delivery, the auditor became the agent of the grantee, and a delivery to him gave the deed full force.

As to the next question, the facts shown by the record are, that long prior to the making of the deed in question, negotiations had been in progress between the parties thereto, looking to a marriage between them. More than a year before such execution, the grantor in said deed had asked of the grantee

her hand in marriage, but the grantee had refused at that time to enter into a contract in relation thereto, on account of the want of visible means of support for a family in the hands of the grantor. Some time after this, by reason of the death of a relative, the grantor became the prospective owner of property including that in question, and upon his suggestion of this fact to grantee, and an agreement on his part that as soon as his title to the land in question was perfected he would deed it to her, she consented to enter into a contract of marriage with him, and did enter into such contract. Some time after this, the grantor's title having been perfected, he wrote the grantee to that effect, and inclosed to her the probate proceedings showing title in him. Whereupon she at once took the papers to her attorney, and caused to be prepared a draught of a deed, which she sent the grantor, with instructions for the execution and delivery as hereinbefore stated. At that time, as we have seen by the conceded facts above stated, the grantee in said deed had no knowledge whatever of any circumstances which would make the execution of such deed on the part of the grantor fraudulent as to him; and the sole question is as to whether or not, as between the parties thereto, there was any consideration for the execution of said deed. That the contract of marriage is a good consideration for a deed made on account thereof is unquestioned. Such a contract has been held not only to be a good consideration, but a valuable consideration of the highest nature. Two objections, however, are raised by appellant as against this marriage contract as a consideration for the deed: 1. That it was not in writing, and therefore void under the statute of frauds; and 2. That before the marriage relation was entered into in pursuance of said contract, knowledge of the fraudulent intent of the grantor was brought home to the grantee.

As to the first objection, we may concede it to be as contended for by appellant, and yet, as we view the facts, the circumstances of this case do not bring it within the objection urged. As we view it, this contract of marriage was in fact reduced to writing. It is true that it was not so reduced as to bring it strictly within the rule for the execution of such contracts, but we think it came substantially within such rule; for while it is true that there was no memorandum of agreement signed by the party to be charged, yet we think there was sufficient recital of such contract in the deed to show a written contract; and that under the circumstances

under which said deed was prepared and sent by the grantee to the grantor for execution, she became bound by such recital. This, we think, would be true if the provision in relation to such contract was a recital pure and simple, as, under the circumstances above stated, we think a court should hold the grantee bound by all the recitals in the deed. But the statement relating to said contract in this deed is more than a simple recital: it is stated as a part of the consideration for the deed, and is substantially as follows: "For and in consideration of the love and affection which the said party of the first part has and bears unto the said party of the second part, as also for the better maintenance, support, protection, and livelihood of the said party of the second part, and in consideration of the promise of the said party of the second part to marry him, said party of the first part does by these presents give."

That this memorandum clearly evidenced an agreement of marriage on her part, in consideration of making the deed on his part, is beyond question. And if such memorandum had been signed by her, there could be no doubt but that the statute of frauds had been complied with. And as we have seen that her relations to such statement were such as to make it equally binding upon her as though she had signed it, it follows that there is a sufficient statement of the consideration for said deed. When this deed was delivered, then, it was supported by sufficient consideration, and was binding, not only as between the parties thereto, but as to all the world.

Was the fact that the grantee therein became aware of the fraudulent intent of the grantor before she had actually complied with her contract of marriage by the consummation thereof sufficient to avoid the deed? No case has been cited going to this extent; on the contrary, several cases have been cited which seem clearly to establish a contrary doctrine. See *Smith v. Allen*, 5 Allen, 456, 81 Am. Dec. 758, in which it was decided that though the marriage was prevented by the death of the grantor, yet the deed remained good in the hands of the grantee. What is the consideration for a deed made under such circumstances? We think it is the agreement to marry, and that if the agreement is entered into in good faith, and under such circumstances as to bind the party, and the deed is executed in consideration thereof, the transaction is complete, and the deed will be unaffected by anything that may happen thereafter. If the grantee refuse to

carry out her contract, the grantor has his remedy the same as he would for the violation of any other executory agreement. It would not do to hold that the grantee should, without fault on her part, be deprived of the benefits of her contract. For some months, and in principle it may as well have been for some years, the grantee had been bound by her agreement to marry, entered into in perfect good faith, and for a valuable and proper consideration. To hold that because she afterwards learned of some fact that showed a fraudulent intent on the part of the grantor, she should be deprived of the benefits of a contract which, during its existence, if she at all observed the proprieties of the relation thereby established, practically prevented her from taking any steps looking to the formation of a marriage relation as between herself and any other party, would, to our minds, be unjust in the highest degree. Naturally, during the continuance of this contract, the associations between the parties were very intimate, and the affections may have become so involved that to break off the relation would destroy the happiness and perhaps the health of the parties thereto. If the argument of appellant were to prevail, the innocent party must refuse to carry out a contract upon which her heart has become fixed, or enter into the same without any such safeguard as her prudence had thought it necessary to provide for. It is impossible to place the parties in the condition they were in before the execution of the deed, and as the innocent party cannot be put in *status quo*, she cannot be compelled to surrender the fruits of her bargain. But it is not necessary to enlarge upon the question. As we view the law, it is the contract to marry, and not the marriage itself, which is the consideration which supports the deed, and this being so, if at the time the deed is made the contract to marry for which it is given is a binding one between the parties, and executed with the solemnities required by the statute for that purpose, an indefeasible title vests in the grantee.

It follows that the decree of the court below must be affirmed.

DEEDS — DELIVERY BY RECORDING. — The grantor's recording a deed expressing the receipt of the purchase-money is *prima facie* a valid delivery: *Burks v. Adams*, 80 Mo. 504; 50 Am. Rep. 510, and note; *Blight v. Schenck*, 10 Pa. St. 235; 51 Am. Dec. 478, and note. The acknowledgment of a deed for the purpose of registration is delivery: *Newlin v. Osborne*, 4 Jones, 157; 67 Am. Dec. 289, and note. The delivery of a deed to the recording

officer for the grantees, and as their deed, is a sufficient delivery, where the grantees agree to accept the deed before its execution: *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637, and note with cases collected; *Boody v. Davis*, 20 N. H. 140; 51 Am. Dec. 210, and note. Whether there has been a delivery is dependent upon the intent of the grantor; and if his intent is apparent, delivery for record, though not known to the grantee, if followed by his assent, is a good delivery: *Lee v. Fletcher*, 46 Minn. 49; and such delivery may be good, even though the grantee was ignorant of the existence of the deed: *Sheffield Land etc. Co. v. Neill*, 87 Ala. 158. See also note to *Hochenhull v. Oliver*, 12 Am. St. Rep. 238, where all the recent cases on this subject are collected.

DEEDS — CONSIDERATION — MARRIAGE. — Marriage is a valuable consideration: *Verplank v. Sterry*, 12 Johns. 536; 7 Am. Dec. 348, and extended note; *Cohen v. Knox*, 90 Cal. 266. A promise by a woman to marry the grantor is a good consideration for a deed, and she will be entitled to hold the land against his creditors, although the marriage is prevented by his death: *Smith v. Allen*, 5 Allen, 454; 81 Am. Dec. 758.

BOARD OF TRADE OF SEATTLE v. HAYDEN.

[4 WASHINGTON, 283.]

WIFE CANNOT BECOME PARTNER IN BUSINESS WITH HER HUSBAND. — A married woman cannot make a contract of partnership with her husband.

THE facts are stated in the opinion.

Slade, Hadley, and Hadley, and Bruce and Brown, for the appellant.

Dorr and Finch, Strudwick, Peters, and Van Wyck, Fairchild and Rawson, and Allen and Powell, for the respondents.

STILES, J. These were four cases, the trials of which were consolidated. In two of the cases the theory of the complaints was that appellant and her husband were actual partners in the mercantile business under the firm name of J. P. Hayden & Co. In the other two, the theory was that the community composed of the husband and wife was carrying on business, and that the husband and wife were its agents. The evidence did not tend to support either theory as pleaded, but was directed wholly to an effort to show that J. P. Hayden was doing business under the name of J. P. Hayden & Co., and that appellant made herself liable as a partner by "holding out." The real object in making appellant a party, and taking judgment against her, was to subject certain real estate which she claims as her separate property to the payment of debts incurred by

J. P. Hayden & Co. The main question involved is, Can a husband and wife become partners in trade in this state? It is claimed that they may, under the act of November 21, 1881, commonly known as chapter 183 of the code of that year. Of that chapter the following sections are supposed to be especially pertinent to the matter in hand: —

“Sec. 2396. Every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued, as if he or she were unmarried.”

“Sec. 2398. All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights she shall have the same right to appeal in her own individual name to the courts of law or equity for redress and protection that the husband has.”

“Sec. 2400. The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber, or devise by will, such property, to the same extent and in the same manner that her husband can property belonging to him.

“Sec. 2401. Should either husband or wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and to the same extent as if they were unmarried.”

“Sec. 2406. Contracts may be made by a wife and liabilities incurred, and the same may be enforced by or against her, to the same extent and in the same manner as if she were unmarried.”

Prior to the act of 1881, but for the acts commencing in 1869, the common law would have regulated the property rights of husband and wife. It did then, and still does, regulate them, excepting so far as the statute has directed otherwise; and notwithstanding that this act provides, in section 2417, that the “rule of common law that statutes in derogation thereof are to be strictly construed has no application to this act,” it is not to be supposed that the legislature in-

tended or proposed to extend the scope of the act beyond the language used, further than the implications naturally flowing therefrom. At the common law, a wife could not be a partner in business with any one, because partnership is based on a contract, as to which she was under a disability, and yet in equity she had always been permitted to enforce contracts made for her benefit, even with her husband, and her claim against him as her debtor had always been sustained: Story's Eq. Jur., secs. 1372, 1373; *Valensin v. Valensin*, 28 Fed. Rep. 599; *Clark v. Hezekiah*, 24 Fed. Rep. 663; *Huber v. Huber's Adm'r*, 10 Ohio, 372. She could have a separate estate,—meaning an equitable estate held by a third person in trust for her. This estate she could charge in equity, but not at law. Judgments upon her debts went, not against her person, when allowed at law, but were allowed as equitable burdens upon her estate or personal property in possession at the time of the marriage and that acquired afterward; her choses in action when reduced to possession, and her earnings, became her husband's; in her freeholds and lands in fee the husband took a life estate; he became liable for her antenuptial debts, and jointly with her for her torts during coverture; her responsibility at law for contracts was entirely suspended; and in equity, before the courts would hear anything against her, it must appear that she was possessed of a separate estate in the common-law sense. Now, this act of 1881 does certain things for a married woman: 1. It gives her full dominion over her own property, whether acquired before or after marriage, to enjoy and dispose of it without the intervention of her husband, or responsibility for him or his debts; 2. It removes from her all civil disabilities not imposed upon her husband; 3. She can sue and be sued as if she were unmarried, either at law or in equity; 4. For her debts she alone is responsible; 5. Her property is chargeable with family expenses. In short, the purpose of the act seems to be to set her free from all influence or dominion of her husband, in so far as her property rights are concerned, and leave her to manage, control, and dispose of them as she pleases, whether to her gain or loss.

In this opinion we shall not discuss the question how large her power is, but confine ourselves to the single matter before us. Counsel for respondents contend that as it is the evident purpose of these provisions to emancipate the wife from the control of the husband, and to enfranchise her with the

power denied to her under the common law to acquire, hold, enjoy, and dispose of property, and do business on her own account as freely as he can, or even more freely than he can, under the same act, it must follow that she can enter into a contract of partnership in all the ways and with all the liabilities that her husband can, and that unless she is permitted and held to be able to enter into the same contracts with him that she can with others, she is deprived of the full measure of liberty which the law intends to confer upon her. It may be said that she can, and in some case will, be held to become a general partner with third persons under the terms of the act and the necessary implications thereof. It has been so held in *Newman v. Morris*, 52 Miss. 402, *Abbott v. Jackson*, 43 Ark. 212, and elsewhere, when no one of the persons engaged with her as partners was her husband.

But the question still remains, Does the statute intend that she can enter into ordinary contracts with her husband, and particularly the contract of partnership? On this point we think the position of the respondents is antagonistic to itself. In the foreground of the discussion is placed the proposition that the purpose of the statute is to free the wife from the control and influence of her husband, and to relieve her property from his debts and management; but the next following suggestion, that unless she can become his partner she will not be wholly free, if yielded to will place her and her property within touch of the very dangers which it is sought in the first place to withdraw her from. Her improvident husband, by the most ordinary persuasion, or by his mere declaration made in her presence, as in the case at bar, could, in spite of her, unless she assumed a hostility, which would endanger the continuance of the marriage relation, waste and dissipate her entire estate, and thus the very purpose which, it seems to us, stands out the most clearly in the act in question, i. e., to secure her protection in the management and enjoyment of her estate, would be defeated.

In Massachusetts, the married woman's property acts, which existed until 1874, when the legislature expressly forbade husband and wife to contract, provided: "Any woman may, while married, bargain, sell, and convey her real and personal property, which may be her sole and separate property, or which may hereafter come to her by descent, devise, bequest, or gift of any person, except her husband, and enter into any contract in reference to the same, in the same manner as if she were

sole"; and "any married woman may carry on any trade or business, and perform any labor or services, on her own, sole, and separate account; and the earnings of any married woman from her trade, business, labors, or services shall be her sole and separate property, and may be used and invested by her in her own name; and she may sue and be sued as if sole, in regard to her trade, business, etc.; and her property acquired by her or her trade, etc., may be taken on any execution against her." This act covers every material point of our own, and notably the wife is permitted to make "any contract" in reference to her property; which is all that any person can do. But in *Lord v. Parker*, 3 Allen, 127, it was held that she could not be a partner in a firm where her husband was a partner. Speaking of the statutes, the court said: "Their legal object is to enable married women to acquire, possess, and manage property, without the intervention of a trustee, free from the interference or control and without liability for the debts of their husbands. They are in derogation of the common law, and certainly are not to be extended by construction. And we cannot perceive in them any intention to confer upon a married woman the power to make any contract with her husband, or to convey to him any property, or receive any conveyance from him. The power to form a copartnership includes the power to create a community of property, with a joint power of disposal, and a mutual liability for the contracts and acts of all the partners. To enter into a partnership in business with her husband would subject her property to his control in a manner hardly consistent with the separation which it is the purpose of the statute to secure, and might subject her to an indefinite liability for his engagements. The property invested in such an enterprise would cease to be her "sole and separate" property. The power to arrange the terms of such a contract would open a wide door to fraud in relation to the property of the husband. If she could contract with her husband, it would seem to follow that she could sue him and be sued by him. How such suits could be conducted, with the incidents in respect to discovery, the right of parties to testify, and to call the opposite party as a witness, without interfering with the rule as to private communications between the husband and wife, it is not easy to perceive; and the consequences which would follow in respect to process for the enforcement of rights fixed by a judgment, arrest, imprisonment, charges of fraud, proceedings *in invitum*

under the insolvent laws, and the like, are not of a character to be readily reconciled with the marital relation. We cannot suppose that an alteration in the law involving such momentous results, and a change so radical, could have been contemplated by the legislature, without a much more direct and clear manifestation of its will."

To the same effect is the construction of the similar statute by the supreme court of the state of Maine: *Smith v. Gorman*, 41 Me. 405; *McKeen v. Frost*, 46 Me. 239. In Michigan, Howell's Statutes, section 6295, provides that the separate property and estate of a married woman "may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed to her, in the same manner and with the like effect as if she were unmarried." And section 6297 provides that "actions may be brought by and against her in relation to her sole property, in the same manner as if she were unmarried." It is true that these provisions in the Michigan statute (and those of several other states) speak particularly only of her separate estate, but her separate estate is, by section 6295, expressly defined to be the same as that which is equally her separate property in this state; but if she be thus enabled to contract with absolute freedom in reference to her separate estate, then, according to the logic of respondent's argument, her freedom in that respect would be unlawfully curtailed by holding that she could not contract with reference thereto with her husband. Yet the supreme court of Michigan, in *Artman v. Ferguson*, 73 Mich. 146, 16 Am. St. Rep. 572, after alluding to decisions in other states where it is held that a married woman may be, where she has separate estate, a partner with persons other than her husband, uses this language: "It is the purpose of these statutes to secure to a married woman the right to acquire and hold property separate from her husband, and free from his influence and control; and if she might enter into a business partnership with her husband, it would subject her property to his control in a manner wholly inconsistent with the separation which it is the purpose of the statute to secure, and might subject her to an indefinite liability for his engagements. A contract of partnership with her husband is not included within the power granted by our statute to married women. This doctrine was laid down in *Bassett v. Shepardson*, 52 Mich. 3, and we see no reason for departing from it. The important and sacred relations between man and wife, which lie at the very

foundation of civilized society, are not to be disturbed and destroyed by contentions which may arise from such a community of property, and a joint power of disposal and a mutual liability for the contracts and obligations of each other."

In Indiana, under the third section of the act of March 25, 1879, it was provided that a married woman might enter into any contract in reference to her separate personal estate, trade, business, labor or services, and the management and improvement of her separate real property, the same as if she were sole, and her separate estate, real and personal, should be held liable, and on execution sold. But in *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607, and in *Scarlett v. Snodgrass*, 92 Ind. 262, it was distinctly held that she could not bind herself by a contract of copartnership with her husband. These citations from eminent courts are sustained in *Schouler on Husband and Wife*, section 317, and 2 *Bishop on Married Women*, section 435.

Opposed to these adjudications, counsel cites us to a line of authorities, of which *May v. May*, 9 Neb. 16, 31 Am. Rep. 399, is a sample. There, a husband made and delivered his promissory note to a third party, who indorsed and delivered it to the maker's wife, and a second note he made directly to his wife. She brought an action at law against him on both notes, and the court held that the demurrer of the wife to the husband's answer, setting up the marriage of the parties in the nature of a plea of abatement, should have been sustained. The statutes of that state with regard to the separate property of married women are substantially the same as our own, and we see no reason for dissenting from the views therein expressed, and the conclusions therein arrived at. The holding of the court was, in effect, simply to substitute an action at law for a suit in equity. In its decision, on page 25, the court said: "Even under the old system of practice, and before the beneficent legislation defining the rights of married women herein quoted, this could have been done by resorting to the circuitry of proceeding in the name of a trustee and a court of equity. But now not only is the administration of law and equity vested in the one court, but all forms of procedure which heretofore distinguished legal and equitable suits are abolished, and the need of the intervention of a trustee is done away with by the statute which provides that 'every action must be prosecuted in the name of the real party in interest.'"

But, notwithstanding these cases and the doctrine established by them, no case is cited, and we have not been able to find one, in which either husband or wife has been permitted either at law or in equity to enforce a purely executory contract against the other, and in that lies the kernel of this controversy, because such a contract must be enforceable by both parties, and at its beginning it is entirely executory. The terms of the partnership may be that it shall continue for a certain length of time, that certain capital shall be invested, that the services of the parties to the contract shall be devoted to the business of the partnership, that the profits and losses of the business shall be divided equally or in certain proportions, and many others, all of which are executory, and some of which are absolutely indispensable to the prosecution of any partnership business to advantage. It is also insisted, and citations are made to authorities to show, that the husband and wife, in states where the doctrine of community property prevails, are, in a sense, partners, at all events. One of the citations is *Fuller v. Ferguson*, 26 Cal. 547, and another is Schmidt's Civil Law of Spain and Mexico; but turning to *Fuller v. Ferguson*, 26 Cal. 567, we find this language: "The law recognizes a partnership between the husband and wife as to the property acquired during marriage, and which exists until expressly renounced in the manner prescribed." To this community or partnership belongs,—

1. All the property, of whatever nature, which the spouses acquire by their own labor and industry;
2. The fruits and income of the individual property of the husband and wife;
3. Whatever the husband gains by the exercise of a profession or office;
4. The gains from the money of the spouses, although the capital is the separate property of one of them."

It is scarcely necessary to say that because the relation of husband and wife as to their common property is likened to a partnership, the reason for the similitude is totally wanting when their separate property is concerned.

But the respondent produces two decisions of New York and Mississippi, respectively, which expressly hold that a husband and wife may be partners: *Suau v. Caffé*, 122 N. Y. 308; *Toof v. Brewer*, Miss., Feb. 20, 1888; 3 South. Rep. 571. The statutes of New York governing the former case were almost identical with those of Massachusetts above quoted. Husband and wife filed a certificate by which they assumed to form a limited partnership under the firm

name of "George Caffé"; the husband was the general and the wife the special partner, she contributing twenty-five thousand dollars. The firm became indebted, and both husband and wife were sued. The court, after reviewing New York cases only, said: "Upon principle and authority, we think that when a husband and wife assume to carry on a business as partners, and contract debts in the course of it, the wife cannot escape liability on the ground of coverture."

This, as is seen by the facts above stated, was an extreme case, in which the wife had, by a solemn instrument placed upon file among public records, shown her intention of assuming a partnership relation with her husband, and contributing to the firm large sums of money. Whether or not the firm was insolvent is not disclosed; all that appears is, that she was retained as a party to the action. But we find that of the seven judges of the New York court of appeals, but four joined in the opinion, while three dissent on the very point in question. Haight, J., in his dissenting opinion, reviews the course of decision in the state of New York, as well as in other states, and comes to the conclusion, which is, we think, unassailable, that the majority opinion was wrong. The decision in this case is to us a curious one, inasmuch as we find the same court, only one year previous, in the case of *Hendricks v. Isaacs*, 117 N. Y. 411, 15 Am. St. Rep. 524, holding by a unanimous court that under these same statutes a husband and wife could not contract with each other at all. *Toof v. Brewer*, Miss., Feb. 20, 1888, 3 South. Rep. 571, was a controversy which was controlled by the statutes of Arkansas, which are again almost exact duplicates of those of Massachusetts. The court, after alluding to *Abbott v. Jackson*, 43 Ark. 212, in which it was held that a married woman could become a partner as a sole trader with a third person other than her husband, and would, as to her property, be bound by all the contracts of the firm as effectually and to the same extent as if she were a man, discusses cases in Massachusetts, New York, and other states, and comes to the conclusion that a married woman, under the law of Arkansas, could also become the business partner of her husband. Just why it becomes necessary for the court in this case to decide this question is not clear from the report. It is said that the Brewers, husband and wife, were carrying on planting operations in Arkansas, and Toof and others made to them advances of supplies. After this, the Brewers moved to Tennessee, and there gave to Toof

and others four notes in payment of the indebtedness due them, in which notes Mrs. Brewer charged her separate estate for their payment. From this it would seem that the question of partnership was not necessarily involved in the case, but that the real question was, whether, upon her note, which assumed to expressly charge her separate estate, a personal judgment at law should be entered against her. The case of *Wells v. Caywood*, 3 Col. 489, is also cited by respondents, and the general language used by the court in that case, on page 494, is abundantly broad enough to support the citation, were it not that the point in issue had no analogy whatever to that of the case at bar. We conclude, upon the whole, that the better reason, as well as authority, is with the position that these married women's statutes generally agree on their material points, and that it was not intended thereby that a husband and wife could become partners.

But in our statutes there are one or two provisions which we think make this position clearer than it is perhaps in any of the others. Section 2397 substantially makes each of them, as to all transactions between them, a trustee for the other. The burden of proof, as between them, is upon the party asserting the good faith. Persons who are free to contract with each other are not subject to such a rule. They stand at arm's-length, and unless there is actual fraud, the law gives no relief. Again, it would seem that if husband and wife are at liberty to contract with each other with perfect freedom, as strangers, the provisions of section 2416 would have been left out. By that section, husband and wife, when they attempt to make any agreement as to the *status* or disposition of the community property, must do so by the execution of an instrument in writing, and under seal, which must be acknowledged and certified, as a deed to real estate. Why so much solemnity with regard to her interest in community property, and such looseness and absolute want of protection with regard to her separate property, which, it is conceded by all, it was the first purpose of this act to secure to her?

The case at bar is perhaps as strong an example as experience could produce of the evil effects of such a construction of this statute as is contended for by respondents. The wife held certain real estate which she claims is her separate property,—it is all she has. The husband engaged in a mercantile business in a building built by her upon her land, and painted over the door a sign, "J. P. Hayden & Co." He

went to Seattle to buy goods for his stock, and his wife went with him. In a certain store where he was about to make some purchases he was asked who constituted the firm. His answer was: "My wife is the only partner I have." She sat within a few feet of where this was said, and the witness who testified to the statement of Mr. Hayden thought she might have heard what he said. Again, a traveling agent for a firm in San Francisco, who sought to sell Hayden goods, when in the store at Fairhaven, asked a question similar to the one asked in Seattle, and received a similar answer; and on this occasion Mrs. Hayden was sitting at a desk, in the view of the two men, and again the testimony was that she might have heard what her husband said. The jury found as a special verdict that these were the only two men to whom any such statement was made, although others were testified to. Yet upon this testimony, and some other of as slight moment, and because, as it is said, the wife remained silent and did not deny what her husband said in her hearing, she was held to be a general partner by "holding out," and a judgment was rendered against her not only for the claims of the two firms to whose representatives her husband had said that she was his partner, but also for the claims of eighteen or twenty other firms, none of whom, with the exception of one or two, pretended to have heard that she was in any wise interested in the business, or that she existed as the wife of J. P. Hayden.

It is clear that to sustain such a judgment would be to render the estate of every married woman wholly unsafe, and all but destroy the most beneficial purpose designed to be subserved by the statute as we understand it.

Judgment reversed, and cause dismissed.

SCOTT, J. (concurring). I concur in holding that a husband and wife cannot enter into a partnership with each other to carry on a business. This is the law in most of the states, and all arguments advanced in favor of such a holding elsewhere, in so far as their laws relating to the removal of the disabilities of married women are like our own, derive much greater force in a state where community property laws prevail, as here. Our statutes recognize but two kinds of property which can be held or owned by married persons,—separate property and community property. The statutes point out how this property may be acquired, and define what it is, ac-

cording to the manner and time in which it is acquired. The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, is her separate property, and the same is true with regard to like property owned by the husband. Section 1399 of the General Statutes (former section 2409) provides that all property not acquired as prescribed in any one of the ways mentioned, which is acquired after marriage by either husband or wife, or both, is community property. It has been held that their interests in this community property are indissoluble, during the existence of the community, to the extent that the interests of either therein cannot be reached separately by any third party. The interest of each in the property is equal, and it would not be contended that by any mutual arrangement between themselves they could provide that either should have a lesser interest than the other in said property without destroying its community character.

Section 1401 of the General Statutes provides that "nothing contained in any of the provisions of this chapter, or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the *status* or disposition of the whole or any portion of the community property then owned by them or afterwards to be acquired, to take effect upon the death of either." This seems to me to clearly preclude the idea of their entering into any such agreement affecting their property interests, to take effect prior to the dissolution of the community, except as expressly provided otherwise. Section 1443 of the General Statutes authorizes the direct conveyance, by one to the other, of his or her interest in all or any portion of their community real property, which thereby becomes the separate property of the grantee, but it is apparent that such a deed, to be effectual, must convey the entire interest of the grantor in the property, designated in the deed, from the one spouse to the other. No lesser or partial interest of the grantor could be conveyed in any event, because this would have the effect of destroying its community character, and leave it neither separate or community, which would effect a result the law does not contemplate. If a husband and wife can become partners in business, they can form the same kind of a partnership that other persons can, and enter into an agreement whereby one could take a small interest in the business and the profits thereof, and

the other the larger one. The property acquired through the pursuance of this business would not come under either head of the two classes recognized; it could not be held to be separate property, for it would not be acquired in any one of the ways specified, and it could not be community property, because, as said, in community property their interests must be equal, while, according to the partnership contract, their interests might be very unequal. This would create a third species of property owned by husband and wife which the law does not recognize. It seems to me to be clearly the intention of the law that only the two species of property can belong to the community or to either of its members; that the law is a limitation in this respect, and will not permit the holding or ownership of any other kind of property than that which is designated as separate and that which is designated as community, and the distinguishing features of its acquisition have been clearly pointed out, and define its character; especially, for these reasons, I think that in this state, where community property laws obtain, that it would be contrary to the whole law on this subject to permit the husband and wife to enter into any contract or agreement whereby they might acquire property of a character other or different from that specified, which the law expressly permits them to hold and enjoy. It is true, we have some statutes which, construed without reference to others, would seem to allow the wife to enter into any contract, and which remove all restrictions in this respect. I think our statute law upon this subject goes to a greater extent than that of the states from which the cases have been cited.

Section 1408 of the General Statutes (section 2396 of the Code of 1881) provides that every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued, as if he or she were unmarried; and section 1410 (section 2406 of the Code of 1881) provides that contracts may be made by a wife, and liabilities incurred, and the same may be enforced by or against her, to the same extent and in the same manner as if she were unmarried; yet when considered in connection with our other laws relating to the property rights of married persons, it is apparent that they are considerably restricted thereby, and it would be wholly incompatible and inconsistent with such other provisions to hold that a husband and wife could enter into any joint arrangement or

agreement between themselves creating a different kind of ownership in property from the ones specified, to take effect before the death of either, and it would be strongly against public policy to allow them so to do, and thus likely give rise to interminable and unfathomable complications.

Our laws cannot, in accordance with recognized rules of construction, be held to authorize the husband and wife to enter into a partnership with each other for the purpose of trade or business, although it may be possible they might form some particular kind of an agreement for such a purpose which might not conflict with their rights of property as defined by the statutes. This is very doubtful, however; and when considered in all its bearings with the rights, duties, and liabilities of partners to each other and to creditors, it is evident that it is not the intent of the law to confer any such authority upon them. The effect that such an arrangement might have, or must necessarily have, upon their property rights as classified, is the strongest argument that can be advanced against the position of the respondents, as it would destroy the distinction between the classes of property they may own as declared by the statutes.

Section 1444 of the General Statutes provides that a husband or wife may appoint the other attorney in fact with full power to sell, convey, and encumber his or her separate estate, both real and personal; and section 1446 makes similar provision with regard to their community property; and with section 1443, further assisted by the broad scope of sections 1408 and 1410, practically subjects the wife to the influence of the husband as to the disposition and control of her property, separate or community, it seems to me, as fully as any partnership agreement between them could possibly effect, and I should be forced to the conclusion that they might become partners in trade with each other, were it not for the statutes prescribing and defining the kinds of property a husband and wife may own and acquire. It is a matter of experience that their property rights and relations become complicated, at best, under the practical workings of the law as expressed and interpreted; and as a matter of public policy it would be very undesirable to still further allow them to become involved in mercantile partnership relations, with all its possible resulting consequences, conflicts, and complications.

DUNBAR, J., delivered a dissenting opinion, of which the following is a synopsis: The decision in this case is an instance of the judicial repeal of a

statute. It is a well-understood and universally recognized fundamental principle of our government that the legislative and judicial departments of the government must be kept distinct and separate. The first warning note sounded by all writers on statutory interpretation is, that when the language of a statute is plain and unambiguous, the duty of interpretation by the court does not arise. There is nothing ambiguous or doubtful in the language or provisions of section 2396 of chapter 183 of the Code of 1881. There is therefore no room for construction, and the only duty of the court is to declare it the law, and decree its enforcement. The real intention of the law-makers must be gathered from what they say; and where the language is not technical, it must be given its ordinary and popular meaning. In this statute there are no provisos, and no exceptions expressed. What right, then, has the court to step in, and, under the guise of construction, inject a limitation which the legislature did not provide for, and which, in effect, renders nugatory the law passed by that body? It is an easy, but a dangerous, thing for courts to wander off in hazy theories and speculations concerning what the legislature meant, and to base their conclusions on the policy or impolicy of the law. This should only be done when the patent ambiguity of the law compels it: *Endlich on Interpretation of Statutes*, sec. 4. Yet the majority, by an argument based on the supposed hardships which would be imposed upon married women, have come to the conclusion that the legislature did not mean what it plainly said. If the language of section 2396 could possibly be tortured into anything doubtful, section 2406 plainly shows that the legislative intent was to remove all civil disabilities so far as property rights are concerned. The legislature evidently understood the full scope of the law it was enacting, and of its far-reaching effects, and where, in its opinion, the limitation was necessary, it provided for it, as in the proviso that "nothing in this chapter shall be construed to confer upon the wife any right to vote or hold office, except as otherwise provided by law." Had it intended the law to operate as claimed by the majority, it would evidently have incorporated a proviso in section 2406 substantially as follows: "Provided, no married woman shall enter into a contract of partnership with her husband." But it is left for the court to enact this proviso by judicial construction.

The majority recite at length the provisions of the common law, and draw deductions from its analogies, when, by section 2417, the legislature evidently attempted to emancipate this law from the rule now insisted upon by the court; and the plain rule of construction provided by the legislature is waved aside by the majority. It is to be presumed that the legislature realized the fact that it was enacting a statute in derogation of the common law, and that it did not want the law hampered by the rule of construction mentioned. The language of section 2417 is so plain that there is no room for construction. If the plain provisions of this law can be argued out of existence, all the laws of the state are at the mercy of judicial construction. Sections 2397 and 2416 do not sustain the theory of the majority. The very best reasons exist for requiring transactions concerning community property to be attended with solemnity and certainty. Both parties have an interest in such property, and delicate relations exist which do not exist at all concerning the separate property of either of the spouses. The separate property is more independent, and the fact that the law imposes these solemn protections upon community property would rather strengthen the idea that the use of separate property was entirely unrestricted. For many years, the law, in obedience to popular demand growing out of feudal edu-

cation, stood *in loco parentis* to woman; she was regarded as not being able to transact business, and had to act under a trustee or guardian. Advancing thought has demanded other legislation, and woman's independence and capability have been recognized by legislation in different states. The legislature of this state has seen fit to grant to a married woman an untrammelled control of her separate property. The law presumes her capable of protecting her own property, and it is not now the duty of the court to assume to stand *in loco parentis*, or sally forth in quixotic zeal to relieve women from conjugal oppressors, or from burdens real or imaginary. The majority argue that the case at bar is an instance of the evil effect of the construction contended for by the respondents, because the wife was held to be a partner by "holding out," when the testimony did not justify such a conclusion. This argument is without force, and will apply equally to nearly every law on the statute-books. Juries are continually rendering verdicts and courts entering judgments based on inadequate testimony. It is simply a question of fact, to be tried as any other such question is to be tried.

POWER OF MARRIED WOMEN TO BE PARTNERS. — At common law a married woman could not become a partner in business with any one, because she was under a general disability to contract or to engage in trade. The disabilities of married women to contract in reference to their separate property have been removed by legislation to a greater or less extent in all the states of the Union. In a considerable number of states, it is still held, however, that a married woman cannot become a partner in business with any one so as to subject her separate estate to its obligations: *De Graum v. Jones*, 23 Fla. 83; *Bradstreet v. Baer*, 41 Md. 19; *Cruzen v. McKaig*, 57 Md. 454; *Howard v. Stephens*, 52 Miss. 239; *Brown v. Jewett*, 18 N. H. 230; *Knott v. Knott*, 6 Or. 142, 150; *Gwynn v. Gwynn*, 27 S. C. 525; *Hagan v. Hoover*, 33 S. C. 219; *Frank v. Anderson*, 13 Lea, 695; *Bradford v. Johnson*, 44 Tex. 381; *Wallace v. Finberg*, 46 Tex. 35; *Brown v. Chancellor*, 61 Tex. 437; *Greene v. Ferguson*, 62 Tex. 525; *Miller v. Marx*, 65 Tex. 131; *Purdum v. Boyd*, 82 Tex. 130; *Carey v. Burrus*, 20 W. Va. 571; 43 Am. Rep. 790. In delivering the opinion of the court in the case last cited, Green, J., said: "As every contract of a married woman made while living with her husband is absolutely null and void in a court of law, it must follow that while living with her husband she cannot form a valid partnership with a third person which a court of law would recognize. And though she went through the form of entering into such a partnership while living with her husband, she could not be sued for a debt of the partnership in a court of law; for in the view of a court of law, she would not be a member of the partnership, and never was such member." But in *Newman v. Morris*, 52 Miss. 402, it was held that, under section 1780 of the Mississippi code, which provides that "when a married woman engages in trade or business as a *feme sole*, she shall be bound by her contracts, made in the course of such trade or business, in the same manner as if she was unmarried," a married woman may enter into a mercantile partnership, and when she does so, she will be bound for firm debts, whether contracted by herself or by her copartner. In delivering the opinion of the court in that case, Chalmers, J., said: "The implied authorization of the statute for a married woman to trade as a *feme sole* gives her the power to enter into a partnership as a *feme sole* can. Having entered into it, all future contracts made by her partner about the partnership business become her contracts as fully as if made by her in person." See also *Abbott v. Jackson*, 43 Ark. 212.

PARTNERSHIP BETWEEN MARRIED WOMAN AND THIRD PERSON OTHER THAN HER HUSBAND. — Where the statutes of a state give to a married woman the power to contract as to her separate property, and to carry on business, she may enter into partnership with third persons, other than her husband. And it is no objection to her doing this that she thereby becomes liable for the acts of others. But her separate property is still hers, and does not become liable for her husband's debts: 1 Bates on Partnership, sec. 136; 2 Bishop on Married Women, sec. 436; *Abbott v. Jackson*, 43 Ark. 212; *Omant v. National State Bank of Terre Haute*, 121 Ind. 323; *Plumer v. Lord*, 5 Allen, 460; *Newman v. Morris*, 52 Miss. 402. In *Abbott v. Jackson*, 43 Ark. 212, it was held that under the Arkansas statute a married woman may form a partnership as a sole trader, with a third person other than her husband, and that she will, as to her separate property, be bound by all the contracts of the firm as effectually and to the same extent as if she were a man.

PARTNERSHIP BETWEEN MARRIED WOMAN AND HER HUSBAND. — According to the great weight of authority, a married woman is held, even under the broadest statutes, to have no power to enter into a contract of partnership with her husband, or to become a member of a firm of which he is also a member: 1 Bates on Partnership, sec. 139; 2 Bishop on Married Women, sec. 435; *Gilkerson-Sloss Commission Co. v. Salinger*, Sup. Ct. Ark., June, 1892; *Montgomery v. Sprinkle*, 31 Ind. 113; *Haas v. Shaw*, 91 Ind. 384; 46 Am. Rep. 607; *Lord v. Parker*, 3 Allen, 127; *Plumer v. Lord*, 7 Allen, 481; *Bowker v. Bradford*, 140 Mass. 521; *Artman v. Ferguson*, 73 Mich. 146; 16 Am. St. Rep. 572; *Swasey v. Antram*, 24 Ohio St. 87; *Payne v. Thompson*, 44 Ohio St. 192. In delivering the opinion of the court in *Lord v. Parker*, 3 Allen, 129, Hoar, J., said: "The power to form a copartnership includes the power to create a community of property, with a joint power of disposal, and a mutual liability for the contracts and acts of all the partners. To enter into a partnership in business with her husband would subject her property to his control in a manner hardly consistent with the separation which it is the purpose of the statute to secure, and might subject her to an indefinite liability for his engagements. The property invested in such an enterprise would cease to be her 'sole and separate' property. The power to arrange the terms of such a contract would open a wide door to fraud in relation to the property of the husband." And Long, J., in delivering the opinion of the court in *Artman v. Ferguson*, 73 Mich. 146, 16 Am. St. Rep. 572, said: "It has been held by a great preponderance of authorities, even under the broadest statutes, that a married woman has no capacity to contract a partnership with her husband, or in other words, to become a member of a firm in which her husband is a partner, even in those states in which she may embark in another partnership; and though she holds herself out as such partner, and her means give credit to the firm, she is held not liable for the debts, as she cannot, by acts or declarations, remove her own disabilities."

In two states, New York and Alabama, it has recently been held that under their statutes a married woman may form a partnership with her husband as with any other person, and that when a husband and wife assume to carry on a business as copartners, and contract debts in the course of it, the wife cannot escape liability therefor on the ground of her coverture: *Swau v. Caffé*, 122 N. Y. 308; *Schlapback v. Long*, 90 Ala. 525. In the case of *Noel v. Kinney*, 106 N. Y. 74, 60 Am. Rep. 423, it was held that where a wife authorizes her husband to contract concerning and for the benefit of her

separate estate, and in so doing to use the name of a firm ostensibly composed of her husband and herself, she is liable upon an obligation executed by him in that form for that purpose. And in *Le Grand v. Bufania National Bank*, 81 Ala. 123, 60 Am. Rep. 140, it was held that when a married woman carries on business under the assumed name of a partnership, she may be sued in the partnership name, and cannot plead her coverture in defense of the action, as against creditors who have dealt with her on the faith of it. Three of the seven judges of the court of appeals dissented from the decision in *Suau v. Caffé*, 122 N. Y. 308, and the doctrine of that case has been criticised: See 32 Cent. L. J. 126.

MARRIAGE DISSOLVES PARTNERSHIP. — The partnership relations between a man and a woman are dissolved by their marriage, and his continued possession of property owned by her, but used by the firm, is by virtue of a license merely, which ceases with her death: 2 Bates on Partnership, sec. 588; *Bassett v. Shepardon*, 52 Mich. 3; *Brown v. Chancellor*, 61 Tex. 437.

KLEPSCH v. DONALD.

[4 WASHINGTON, 436.]

NEGLIGENCE IN BLASTING — WHEN QUESTION FOR JURY. — Where a blast is discharged at a place where it is not unlawful to discharge it, the fact that a man was killed by a rock thrown by the blast, at a distance of from 940 feet to 1,200 feet, in a horizontal direction, presents only a *prima facie* case of negligence, which may be rebutted by showing due care on the part of those who discharged the blast, and the question of their negligence should not be taken from the jury.

DAMAGES IN ACTION FOR DEATH BY WRONGFUL ACT OF DEFENDANT. — In an action for the death of a person, caused by the wrongful act of the defendant, the basis of recovery is the proof of pecuniary damage, and not the proof of the death, caused by the wrongful or negligent act of the defendant.

VIEW OF PREMISES BY JURY — ALLOWING OR REFUSING, IN DISCRETION OF COURT. — In an action to recover damages resulting from the alleged negligence of the defendant, it is a matter within the discretion of the court to grant or refuse a view by the jury of the premises where the injury occurred.

CHARGING JURY UPON MATTERS OF FACT, WHAT IS NOT. — An instruction to the jury that they may consider the relations of the parties and witnesses, and their interest, temper, bias, demeanor, intelligence, and credibility in testifying, is not a violation of the constitutional provision prohibiting judges from charging juries with respect to matters of fact, or commenting thereon.

ACTION by Theresa Klepsch, administratrix, against the defendants, partners under the firm name of Donald, Smith, and Howell, to recover damages in the sum of five thousand dollars for the death of her husband, George Klepsch, alleged to have been caused by the negligent discharge of a blast by the defendants. The jury rendered a verdict for the plaintiff

for five thousand dollars, and from the judgment entered thereon the defendants appealed. Other facts appear from the opinion.

Thomas O. Griffiths, for the appellants.

Arthur and Reagan, John B. Hess, and W. E. King, for the respondent.

STILES, J. The respondent, plaintiff below, was the wife of the deceased, George Klepsch, who died from wounds inflicted by the fall of a rock thrown through the roof of his house by a blast alleged to have been fired by the appellants, within the city of Spokane Falls.

The material portions of the complaint were as follows: "5. That the defendants, by their negligence, imprudence, carelessness, and wrong conduct, and the carelessness and negligence of their agents and servants, so carelessly and negligently used and managed the giant powder and other material used for exploding, and so negligently and carelessly managed and conducted said blasting that said George Klepsch, deceased, with great force and violence, was struck and hit by a flying rock discharged from said blast caused by defendants, whilst he, the said deceased, was entirely ignorant of any danger, whereby the said deceased was then and there greatly injured, bruised, hurt, and wounded; that by reason of said injuries which ensued in consequence of the negligence and carelessness of the defendants as aforesaid, the said George Klepsch died; and that said injury was caused without any fault or negligence on the part of said deceased, George Klepsch; 6. That the plaintiff was wholly dependent upon the deceased, George Klepsch, for subsistence and support, and by reason of his death is left utterly helpless and in destitute circumstances; 7. That by reason of the premises, the plaintiff, as such administratrix, has sustained damages in the sum of five thousand dollars."

The appellants denied that the rock came from their works, and sought to show that it was thrown from the works of other persons who were blasting in the same neighborhood. Appellants strongly urge this court to hold that the great preponderance of the evidence was in their favor on this point, and to remand the cause for a new trial on that ground; but we do not view it as a proper case for interference with the verdict of the jury, who alone were qualified to determine the weight of the conflicting testimony.

Numerous errors of the court are assigned, the mass of which, however, are included within two propositions, viz.: 1. Did the court err in withdrawing the question of negligence from the jury? 2. Was there any evidence in the case upon which a verdict could be sustained?

1. It will be observed that the allegations of the complaint made the negligence, imprudence, and careless management of the giant powder of the appellants the gist of the action, but the only evidence going to sustain those allegations was that the rock, if it came from appellants' works, was thrown horizontally between nine hundred and forty and twelve hundred feet. Under these circumstances the court took from the jury the entire question of negligence by the following charge: "Under the evidence in this case, the only question for the jury to determine, in order that they should find for the plaintiff, is this: Was the death of George Klepsch caused by the act of the defendants or the act of their servants or employees? There is nothing for the jury to find in this case upon the question of negligence. If the rock which wounded the deceased came from a blast discharged by the defendants or their servants, and that wound was the cause of his death, then your finding should be for the plaintiff."

Appellants complain of this charge, and we think with just cause. Respondent cites as a precedent for this charge, *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, the facts of which perhaps bore out the language used as it was stated in the opinion, that "the uncontradicted testimony showed a clear case of explosion in the city, where many persons were living, and where such an explosion could not take place without strong probability of its injuring some one."

The circumstances of that case seem to have been such that the act of blasting with dynamite or other high explosive at that place was regarded by the court as *per se* a nuisance, and therefore unlawful. So in this case, if there had been facts before the jury such as to warrant the court to instruct as to nuisances, and that an unlawful use of explosives might be found, then the conclusive presumption would have arisen against the appellants, if they cast the rock. But neither the complaint nor the evidence claim or pretend to show that it was unreasonable for the appellants to use the blasting powder in the place they used it, and for the accomplishment of the work they were doing. Indeed, from the point whence respondent's

witnesses say this rock came, it was nearly or quite four hundred feet to the line of appellants' own premises at the point nearest the house of Klepsch. Negligence was therefore made the basis of the action in the complaint; negligence had to be proven, and the jury should have been permitted to say whether there was negligence or not. The appellants conceded at the trial that the mere fact that the rock was blown to so great a distance and off the appellants' premises might be taken as *prima facie* evidence of negligence in the management of the blast which, if not rebutted, would be sufficient to sustain a verdict. This concession was made under protest, and appellants do not now admit it to be good law. But we think that it should be the law of such cases, where the agency used is of a nature so dangerous, and where every trace of the material used and the methods employed are usually blown out of sight and beyond all possibility of proof, except by witnesses who will be naturally unwilling, if not hostile.

Respondent has cited us to the leading English case of *Fletcher v. Rylands*, L. R. 3 H. L. 330, which is reported in full in 1 Thompson on Negligence, 2, and strenuously argues for its adoption as the rule of decision in this case. *Fletcher v. Rylands*, is not an old case at all; it was fully decided in 1868, and there are many cases in this country of equal importance which hold otherwise, and are of earlier as well as later date. The principle there announced was, that "the person who, for his own purposes, brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape; and although harmless to others so long as it is confined to his own property, will be obliged to make good the damages which ensue if he does not succeed in so confining it." That was an application to the storage of water of the same rule of liability to which owners of live animals are subjected upon their escape, which is a rule never adopted in this country as applied to inanimate property. On the contrary, with few exceptions, in America, if one builds a dam upon his own premises, and thereby accumulates water for his own benefit, or if he brings water upon his premises into a reservoir, in case the dam or reservoir give way, and the land of his neighbor is flooded, he is not liable for damage, without proof of some fault or negligence on his

part: *Pixley v. Clark*, 35 N. Y. 520; 91 Am. Dec. 72; *Sheldon v. Sherman*, 42 N. Y. 484; 1 Am. Rep. 569; Gould on Waters, secs. 296-298; Wood on Nuisances, 134. The same principle was the basis of the decision in the case of fire set out by a railroad locomotive, in *Columbia etc. R. R. Co. v. Farrington*, 1 Wash. 202.

But there is also cited to us a line of blasting cases, where negligence was presumed, and the defendants were not allowed to show due care in the manner of conducting the operations. These are *Hay v. Cohoes Co.*, 2 N. Y. 159; 51 Am. Dec. 279; *Tremain v. Cohoes Co.*, 2 N. Y. 163; 51 Am. Dec. 284; *Wright v. Compton*, 53 Ind. 337; *Carman v. Steubenville etc. R. R. Co.*, 4 Ohio St. 399; *G., B., & L. Ry. Co. v. Eagles*, 9 Col. 544. But one of these (*Wright v. Compton*, 53 Ind. 337) was for injuries to the person; all the others were for injuries to real property, from casting rocks and earth thereon. All of the subsequent ones cite the Cohoes cases with approval. But the New York court of appeals has limited those cases, which were decided upon a literal construction of the maxim, *Sic utere tuo ut alienum non lædas*.

In *Loses v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623, it was said that "the damage in the Cohoes cases was the necessary consequence of just what the defendant was doing," — that is, it was no accident which is none the less an accident because it comes from negligence which is not willful or malicious. And in *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279, even, the decision was put upon the basis of nuisance, thus: "A man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance, to the annoyance of the adjoining proprietor. . . . No one questions that the improvement contemplated by the defendants upon their own premises (i. e., a canal) was proper and lawful. The means (blasting at that place) by which it was prosecuted was illegal, notwithstanding."

Carman v. Steubenville etc. R. R. Co., 4 Ohio St. 399, was also decided on the ground of nuisance, the court saying that there was no proof "that the injury was not the unavoidable consequence of blasting in that particular locality." In *G., B., & L. Ry. Co. v. Eagles*, 9 Col. 544, the judgment was sustained because the acts complained of were the natural and probable results of blasting at the locality. *Wright v. Compton*, 53 Ind. 337, was a personal damage case, the plaintiff having been injured by rocks blasted from a quarry near a public highway. The

dicta of the decision show a misapprehension of the Cohoes cases, though the decision was right, because the question of liability was left to hinge on whether warning had been given of the impending blast at a place where to blast at all was a nuisance. So in *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258, where the blasting was so close that each time a blast was set off it was the habit of the blasters to give notice; but there was a failure to notify plaintiff in the particular instance, and he was injured by the fall of a quantity of frozen earth; this was another case where the natural and probable consequence of the blasting at that place was to throw the earth upon plaintiff's land, and injure him personally, unless he were warned.

Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623, contains a thorough and exhaustive review of these and other cases, as applied to stationary boiler explosions, with the conclusion that the question of liability depended on the finding of negligence as a fact; and, as applicable to this case, the rule is laid down more strongly still in *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654, where one who constructed a powder magazine on his premises was sued for damages to real property, accruing from an explosion of the powder in store. The material facts of that case are made clear only by reference to the report in 16 Hun, 257. The plaintiff requested the court to charge "that the powder magazine was dangerous in itself to plaintiff and his property, and was a private nuisance, and the defendant liable to the plaintiff, whether it was carelessly kept or not." This the court refused, and did charge that the jury must find for the defendant, unless they found he carelessly and negligently kept the gunpowder on his premises. The general term of the supreme court affirmed this action; but the court of appeals reversed on the ground that while the request to charge was too broad, the charge given was too limited, and directed that on the new trial the danger arising from the locality where the powder was kept should be submitted to the jury, — that is, whether the place of storage was such as to make the keeping of powder there a private nuisance: See *Hunter v. Farren*, 127 Mass. 481; 34 Am. Rep. 423; Wood on Nuisances, sec. 140.

We hold, therefore, that in this case, as the blasting is not claimed to have been unlawful, the liability of the appellants depended upon whether they were negligent or not, to prove which, under the circumstances, the fact of the injury was

sufficient *prima facie* evidence, but that they should have been permitted to show due care on their part, and that the question of their negligence was for the jury.

2. The only evidence in this case which tended to support the allegation of damage was that deceased was the husband of plaintiff, that they had three children, who were left dependent on plaintiff, and that for a period of two weeks out of seven in which they had resided in Spokane Falls deceased had earned six dollars a day as a bricklayer.

This action was probably brought with reference to Code of 1881, section 717, which we held not to be an existing statute, in *Gratts v. McKenzie*, 3 Wash. 194; but the allegations of the complaint were as good to maintain an action under section 8 as under section 717.

Paragraph 6 of the complaint stated no matter material to the action, as neither the right to recover nor the amount of recovery depended in the slightest upon the pecuniary condition of the plaintiff. But it was incumbent upon plaintiff to allege and prove her damages specially. She alleged damage in five thousand dollars, and recovered that sum without sufficient evidence to sustain it. The case was tried and is argued here upon the theory that the statute which says that the personal representative may maintain an action for damages against the person causing the death of his decedent, and that in every such action the jury may give such damages, pecuniary and exemplary, as under all the circumstances of the case may to them seem just, means that the recovery is to be for causing the death, rather than for the damages (that is, for what the beneficiaries have suffered the loss of), and that upon proof of the death by the unlawful act or neglect of another, the jury are at liberty to award whatever sum they can agree upon, without reference to any proof of pecuniary damage. To support this theory, a number of cases are cited to us from California, of which the leading one is *Beeson v. Green Mountain Gold Min. Co.*, 57 Cal. 20, wherein it has been held that substantially such a construction of the statute of that state is the correct one. A much stronger case supporting that view is *Matthews v. Warner*, 29 Gratt. 570; 26 Am. Rep. 396. The statutes there construed authorize the jury to give such damages as "under all the circumstances of the case may be just": Cal. Code Civ. Proc., sec. 377; or "such damages as to it may seem fair and just": Va. Code, 1873, c. 145.

Our statute does not have the limiting clauses of Lord Campbell's act, which was the parent of all the legislation on this subject; but neither is it as bare and unqualified as those above quoted. In most of the states the language is, "such damages as they may deem fair and just, with reference to the pecuniary injury resulting from such death." Our statute contains the words "pecuniary or exemplary," and they are entitled to be considered, and have their proper weight. Construing them, we do not understand that in every case both pecuniary and exemplary damages are to be given, but that in a proper case, as where the injury occurs through accident procured by some neglect, the damage is limited to pecuniary loss, whereas in cases of injuries caused by moral or legal wrong, amounting to willfulness, exemplary damage may be added. This construction is fair, and is the only one that will place our law in harmony with that of England, and all of the states but four or five, where recoveries of this nature are limited to some reasonable basis of allegation, proof, and actual injury: *Van Brunt v. Cincinnati etc. R. R. Co.*, 78 Mich. 530; *Hurst v. Detroit City Railway*, 84 Mich. 539; *Charlebois v. Gogebic etc. R. R. Co.*, 91 Mich. 59; *Mynning v. Detroit etc. R. R. Co.*, 59 Mich. 257.

3. Under the meager allegations of the complaint, it was error to allow plaintiff to testify as to her children when objection was made. The defendant had no opportunity to meet such matters.

4. The court committed no reversible error in refusing a view of the premises where the injury occurred, though it would seem, from the testimony, that such a view might have been of advantage to the jury in coming to a proper conclusion. It was entirely in the discretion of the court to grant or refuse the request.

5. With competent evidence to sustain it, we think the seventh instruction given by the court would be a proper one. We do not see in it any suggestion to the jury that they might consider either the sufferings of the deceased, or the sorrow or poverty of the respondent or her children, or other sentimental loss.

6. The instruction numbered 9, informing the jury that they might consider the relations of the parties and witnesses and their interest, temper, bias, demeanor, intelligence, and credibility in testifying, was equally unobnoxious, and in no way violated section 16 of article 4 of the constitution.

Other alleged errors are immaterial.

The judgment is reversed, and the cause remanded for a new trial, before which plaintiff will have leave to amend her complaint.

NEGLIGENCE. — INJURY CAUSED BY BLASTING: See *Banner v. Atlantic Dredging Co.*, 134 N. Y. 156; 30 Am. St. Rep. 649; *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515; 18 Am. St. Rep. 248; *St. Peter v. Denton*, 58 N. Y. 416; 17 Am. Rep. 258, and note. See also note to *Hay v. Cohoes Co.*, 51 Am. Dec. 282.

NEGLIGENCE CAUSING DEATH. — DAMAGES RECOVERABLE: *Morgan v. Southern Pac. Co.*, 95 Cal. 510; 29 Am. St. Rep. 143; *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515; 18 Am. St. Rep. 248; *Illinois etc. R. R. Co. v. Slater*, 129 Ill. 91; 16 Am. St. Rep. 242, and note. See monographic note to *Louisville etc. R'y Co. v. Goodykoontz*, 12 Am. St. Rep. 375. See also note to *West v. Western Union Tel. Co.*, 7 Am. St. Rep. 536.

TRIAL. — VIEWING PREMISES: See an extended discussion of this subject in a note to *Bruce v. Bulla*, 92 Am. Dec. 342.

WHITTIER v. PUGET SOUND LOAN, TRUST, AND BANKING COMPANY.

[4 WASHINGTON, 666.]

MECHANIC'S LIEN ONLY MAINTAINABLE FOR MATERIAL TO BE USED IN PARTICULAR BUILDING. — If materials are sold and delivered to a contractor without any knowledge on the part of the seller that they are to be used in the construction of a particular building, no lien can be maintained against the owner of such building.

ACTION to foreclose a mechanic's lien. The opinion states the case.

J. J. Weisenburger and J. R. Crites, for the appellants.

Fairchild and Rawson, for the respondents.

HOYT, J. This action was brought to foreclose a lien claimed by the plaintiffs for certain glass purchased of them by defendant R. C. Jordan, and by him used in the construction of a certain building of which the other defendants were owners, or in which they were interested. In dealing with the plaintiffs in the purchase of said glass, the defendant Jordan acted in his own name, and did not in any manner disclose the fact that he had any contract relations with the other defendants, or either of them, or in relation to the placing upon their or any particular premises any building whatever, and

the glass was sold and delivered to him by the plaintiffs without any knowledge on their part as to the fact that he was engaged in the erection of any building in which the other defendants were interested, or any particular, definite building at all. Under these circumstances, can they maintain a lien against such defendants?

The language of our statute is, that every person who shall furnish materials to be used in the construction of any building shall have a lien therefor. Do the facts disclosed by this record show that this material was furnished to be used in the construction of the building owned by the other defendants? The proof on the part of the plaintiffs showed conclusively that at the time they delivered it to the defendant Jordan it was not delivered with any purpose or intention on their part that it was to be used in the construction of this particular building. It showed, however, that they did not sell it to said Jordan upon his personal credit, but that they so sold it, knowing that he intended to use it in the construction of some building, and intending to look to whatever building it might be thus placed in for their security. And it is argued, on the part of their counsel, that this was a furnishing for use in any building in which said Jordan might afterwards place the same. We are unable to agree with this contention on the part of plaintiffs. The contractor for the erection of a certain building is, by statute, made the agent of the owner for the purpose of binding, so far as is necessary, the building to the erection of which his contract relates, for any and all material which he may purchase for use therein. The agency thus established is a purely statutory one, and will not be extended beyond the necessities of the case; and to hold that any one dealing with the person who has such a contract, without any knowledge of the contract relations between such person and the owner, can get the benefit of the statutory provision in his behalf, would be to announce a new doctrine upon the subject of agency. In the minds of the persons who furnished the goods, there was no thought, at the time they so furnished them, that went beyond the person with whom their dealings were had. And they cannot now be allowed to assert that though they dealt with such person as a principal, they intended to treat him as the agent of some person whom circumstances might thereafter create and disclose. Our statute requires the materials to be furnished for a particular building, in order that a lien thereon

shall be created. And if not furnished directly to the owner, they clearly must be furnished to the contractor, as such, in that particular case, and not simply to a person generally, without any reference to the particular contract under which he is erecting the building. Not only is this construction demanded by the plain reading of our statute, but, as we view them, the authorities called to our attention upon this subject are absolutely uniform in support of this view. We shall not undertake to review any of the authorities cited by the respondents to sustain the view above expressed. Four cases only were cited by the appellants as tending to sustain the contrary doctrine. The case of *Choteau v. Thompson*, 2 Ohio St. 114, thus cited, seems to us clearly upon the other side of the question. The whole language of the court can, to us, be interpreted in no other way, and the only possible sentence in the whole opinion warranting its citation to sustain the doctrine of the appellants is the following: "True, the particular building or craft may not be in the minds of the parties when the contract is made, and yet a lien may arise." But when this expression is read in connection with the context, it is too clear for argument that the court is there talking about materials furnished under a contract directly with the owner, and all that the court intended by such expression is, that where one has made a contract with the owner to furnish material to him for the erection of a building, and a building is erected under said contract, he may maintain a lien therefor, even although at the time the contract was entered into the particular building, or the particular location of the building, which was to be erected had not been definitely determined.

The case of *Hunter v. Blanchard*, 18 Ill. 323, 68 Am. Dec. 547, is less in point, if possible, than the one just referred to. We have given the opinion in that case a careful examination, and are unable to find a single expression therein which can be construed to sustain the doctrine contended for by appellants. As we read that case, it not only holds that the goods must be furnished to be used in the construction of a certain building, but that before a lien therefor can be maintained, they must also be actually used in such construction.

The case of *Wilson v. Howell*, 48 Kan. 150, holds that where material is purchased with the understanding of both parties that it will be used for the erection of a particular building in a certain town, a lien will attach to the lot on which the

house is built, although the precise location of the lot was not mentioned in the contract, and although the vendor did not know the exact description of such lot at the time such contract was made. But it is clear, from the opinion in this case, that the material was furnished to be used in the erection of a certain building, for a certain owner, and the fact that the particular location of such building had not been determined upon at the time such contract was entered into, or said materials furnished, was rightly held not to prevent the lien attaching. But such holding, in our opinion, does not, in the most remote degree, apply to the question presented by the record in this case.

Appellants also cite section 1326 of 2 Jones on Liens, but the text of said section tends much more strongly to sustain the contention of the respondents than that of appellants, and when interpreted in the light of the citations thereunder, and in connection with section 1327, immediately following, and the long list of cases cited to sustain the text of that section, it is evident that the learned author was clearly of the opinion that, under the circumstances presented by this case, a lien could not be maintained.

These are all the cases cited by appellants, and from the careful manner in which their brief was prepared, as evidenced thereby, we have a right to assume that no cases tending more strongly to sustain their contention can be found in the books. And if there cannot, it is clear that the authorities overwhelmingly sustain the contrary doctrine.

In the case of *Eisenbeis v. Wakeman*, 3 Wash. 584, we held that a lien could not be maintained upon any particular building by a person who furnished brick for a firm of contractors for use by them indiscriminately in the construction of certain buildings, for the erection of which they had contracts, and it seems to us that the principle established by the opinion in that case is decisive of the one at bar.

The lien, then, could not be maintained, and the judgment of the lower court in so decreeing must be affirmed.

MECHANIC'S LIENS — MATERIAL-MEN — LIEN OF, WHEN ENFORCEABLE. — A material-man cannot enforce a lien against a building if the materials were not furnished upon the credit of the building, but upon that of the contractor: *Odd Fellows' Hall v. Maser*, 24 Pa. St. 507; 64 Am. Dec. 675, and note; *Duncan v. Aaron*, 6 Houst. 566; *Mulrine v. Washington Lodge*, 6 Houst. 350; *Gurney v. Walsham*, 16 R. I. 698. A mechanic's lien is not created by the purchase of lumber on an open, general account, without refer-

ence to its being used in any particular building: *Hill v. Bishop*, 25 Ill. 349; 79 Am. Dec. 333, and note; *Chopin v. Perse etc. Paper Works*, 30 Conn. 461; 79 Am. Dec. 263, and extended note, discussing the lien of material-men. Claims for materials furnished in the construction of a building, to become liens, must be founded on a contract, express or implied, with the owner of the estate sought to be charged: *Tebay v. Kirkpatrick*, 146 Pa. St. 120.

SLAUSON v. SCHWABACHER.

[4 WASHINGTON, 783.]

MERE PERSONAL TORTS THAT DIE WITH THE PARTY NOT ASSIGNABLE. —

Mere personal torts that die with the party, and do not survive to his personal representative, are not capable of passing by assignment. Where, therefore, an insolvent debtor makes an assignment for the benefit of his creditors, his assignee cannot maintain an action against an attaching creditor and the sheriff for injury to the business credit and reputation of his assignor, resulting from the alleged malicious levy of a writ of attachment made prior to the assignment.

ACTION for malicious attachment. The opinion states the case.

H. B. Slauson, J. W. Langley, and Allen and Powell, for the appellant.

Preston, Carr, and Preston, and W. R. Bell, for the respondents.

DUNBAR, J. This action was brought by the appellant in the court below against respondents, Schwabacher Brothers & Co., and J. H. McGraw, as sheriff of King County, for the alleged malicious levy of a writ of attachment on the stock of groceries of one A. Herramb. This suit was brought by appellant as assignee of said A. Herramb, for her benefit, and for the benefit of her creditors, said assignment having been made under the general insolvency laws approved March 6, 1890. The complaint alleged perishable goods destroyed by reason of said attachment, valued at seventy-five dollars; goods taken from store, valued at fifty dollars. The court allowed proof of these items, and judgment was obtained for the same. But the plaintiff also alleged the payment of clerks and of rent during the time the attachment was in force; also loss of profits of business and sale of goods by assignee, attorney's fee in attachment proceedings, and injury to business credit and reputation. The court refused to allow proof of these losses. Judgment was rendered in favor of

plaintiff for the first two items, from which said judgment he appealed, alleging error of court in rejecting the proof offered.

This case raises the question, What causes of action are assignable under the laws of this state? This being a new question in this state, we have examined with great interest the very able presentation of the law and authorities presented in the briefs, both of appellant and respondents. Of course, it is conceded that at common law the right of action for injuries to personal property died with the party entitled, and that the cause of action was not assignable, and that no chose in action of any kind was assignable. This rule of the common law was, however, modified by 3 Edward III., which permitted the assignment of choses in action to extend to commercial paper. The rigidity of the law was for a while avoided, by the practice of compelling the assignor to allow the use of his name in cases of this kind. But under the provisions of the code compelling all suits to be brought in the name of the real party in interest, we are governed by the rules of the common law as modified by 3 Edward III., and our local statutes. So universal, however, has been the enlargement of the ancient rule by statute that most of the cases reported involve the construction of a statute. We think it may be fairly said that by a great preponderance of authority mere personal torts which die with the party, and do not survive to the personal representatives, are not capable of passing by assignment, and conversely, that a cause of action which does survive to a personal representative can be enforced in the name of an assignee. This test was laid down notably in *Zabriskie v. Smith*, 13 N. Y. 322; 64 Am. Dec. 551; Bliss on Code Pleading, sec. 37; *Byrnie v. Wood*, 24 N. Y. 607; Pomeroy's Eq. Jur., sec. 1275; and is generally the recognized doctrine.

The question then becomes important: What causes of action under our statute abate by the death of the party entitled? or, affirmatively stated, What causes of action survive to the personal representatives? To render an investigation of the cases cited helpful to the court, it becomes necessary to compare the statutes under which they were decided with the statutes of our state. In New York the statute provides that for wrongs done to the property, rights, or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or, after his death, by his executor or administrator, in the

same manner and with like effect in all respects as an action founded on contract. It then proceeds to make a few exceptions, which it is not necessary to enumerate. The language, "for wrongs done to the property, rights, or interests of another," is fully as sweeping as the language of our statute, and yet the court of appeals, in *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551, decided that a right of action for damages caused by false and fraudulent representations of solvency of the vendee of merchandise was not assignable. This is one of the leading cases on this question, and has received much criticism, both favorable and adverse. Mr. Bliss, in his work on code pleading (sec. 43) asserts that the decision was made without the consideration of the statute. The same criticism is made in *Jackson v. Daggett*, 24 Hun, 205, where it is asserted that the question was examined in *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551, on common-law principles and authorities, without any reference to the statute on the subject; and further, that it is against the weight of authority. In *Jackson v. Daggett*, 24 Hun, 205, it is held that under the provisions of the New York code a cause of action against a sheriff, upon his failure to return an execution against property within the time required by law, and for making a false return, is assignable. The same criticism of *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551, is made in *Fried v. New York Central R. R. Co.*, 25 How. Pr. 286. But an examination of this case, in our opinion, shows that these criticisms are unfounded; for while the learned judge (Denio) who penned the opinion of the court did not recite the particular language of the code, he referred to it and commented upon it, and the whole opinion shows that a construction was placed upon the provisions of the code bearing on that question, and that it could not have been decided under the common-law rule. Afterward, in *Haight v. Hayt*, 19 N. Y. 464, the court held that a cause of action against a vendor of land for fraudulent representations as to an encumbrance survived to the personal representatives.

Whether or not a distinction can be maintained between *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551, and *Haight v. Hayt*, 19 N. Y. 464, there is a plain distinction between *Haight v. Hayt*, and the case at bar. In the former, the value of the farm, a part of the estate, had been affected by the fraud practiced, but in the case at bar the estate or property of the assignor had not been affected. The main allegation

of damages is for loss of reputation. It is not a claim for injury or destruction of property; to establish that part of the claim, the court allowed evidence to be introduced, and a judgment was rendered therefor. It is true that the language of the assignment law is broad. Section 13 (p. 87) of the Laws of 1889-90 provides that "any assignee as aforesaid shall have as full power and authority to dispose of all estate, real and personal, assigned, as the debtor had at the time of assignment, and to sue for and recover, in the name of such assignee, everything belonging to or appertaining to said estate, and generally to do whatever the debtor might have done in the premises." But broad as the language is, it only gives the assignee power to deal with property of the estate,—the estate which was assigned,—so that the pertinent question is, What is property of an estate? Or in other words, What is the estate? Is a man's reputation a part of his estate? Can it be said that an assignor's creditors or a decedent's administrators or executors have any financial interest in his reputation? It cannot be any part of the assets of the estate; it cannot be made available to pay the debts of the estate. If, by this attachment, his reputation so suffered that he could no longer pursue the calling of a merchant, then it was simply a personal right to pursue a particular calling or business that he was deprived of, and could in no way affect the estate assigned, and it is only in the estate as it exists at the time of the assignment that the creditors have any interest.

So far as the provisions of section 704 of the Code of Procedure are concerned, they must be construed in connection with the whole chapter and subject under consideration, and especially in connection with the preceding section, 703. We think the only fair construction of section 703 is, that the legislature intended to confer upon personal representatives certain rights in contradistinction to the rights of heirs, and that in section 704 they were legislating with reference to causes of action which already survived, and were not attempting to announce what causes of action should survive. If this theory be not true, then the enactment of section 703 was useless, for it could have been expressed in section 704 by simply the omission of the words "cause of." If the appellant's construction is correct, there is no limit whatever to causes, for causes of action for assault, slander, and for other purely personal causes, would survive; and this would be so

wide a departure from the established rule, that the legislature would hardly be deemed to have intended it without plainly expressing such intention. Again, this construction of the law conflicts with the provisions of the assignment law itself, which we have quoted above, if the rule is to obtain that a power of assignment is to be tested by the survival of causes of action to personal representatives, because, as we have seen, under the provisions of the assignment law, the assignee is only clothed with the authority to act with relation to the property of the estate, and if the rule does not obtain, then the powers of the assignee must be gathered exclusively from the provisions of the assignment law, which is a special enactment on the subject.

Of the cases cited by appellant to sustain her theory, *Stewart v. Balderston*, 10 Kan. 181, was in reality an action to recover fees wrongfully and fraudulently demanded by and paid to the officers of the land-office, and, of course, directly affected the estate of the assignors, and can be readily distinguished from this case. *Davis v. St. Louis etc. R'y Co.*, 25 Fed. Rep. 786, which was also a Kansas case, held that where a transportation company neglected its duty, and by its neglect the property of the assignor suffered damage, it was not a tort to the person, but was a tort which resulted injuriously to the estate, and was therefore assignable. These cases fall squarely within the provisions of the Kansas statute which provides that "in addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or for real or personal estate, or for any deceit or fraud, shall also survive." Under such a statute, the Kansas cases could not have been otherwise decided. *Final v. Backus*, 18 Mich. 218, decided that the assignee of a demand originating in favor of an assignor for the conversion of logs obtained by trespass upon certain lands granted to the assignor may bring trover in his own name. And *Grant v. Smith*, 26 Mich. 201, was a similar case, being an action of trover for the conversion of timber, and was decided on the strength of the decision in *Final v. Backus*, 18 Mich. 218. These two cases would plainly fall under the general rule that prevails where property interests of the estate are involved, and could in no sense be parallel with the case at bar. But outside of that, the Michigan statutes provide that in addition to the action which survived at common law, the following shall survive, that is to say, action of replevin and

trover, action for assault and battery, for false imprisonment, for goods taken and conveyed away, and actions for damages done to real or personal property. And so, without further particularizing, we think most of the cases cited by appellant were either actions for injuries to property of the assignor, or were decided under statutes the provisions of which plainly compel such decisions. Thus in Iowa, the statute laws of 1862 provided that no cause of action, either *ex delicto* or *ex contractu*, abates by the death of either party, if from the legal nature of the case it can survive; and that statute was construed by the supreme court of Iowa, in *Shafer v. Grimes*, 23 Iowa, 550, Judge Dillon delivering the opinion of the court, as abrogating the common law of *actio personalis moritur cum persona*, and consequently, with that construction, only causes of action purely personal would survive, and under the rule that the power to assign and to transmit to the personal representatives are convertible propositions, could also be assigned.

Byrnie v. Wood, 24 N. Y. 607, was a case where the defendant had received large sums of money from the assignor to which he was not entitled. A referee found that the assignee was entitled to recover them back. "Not," says the court in that case, "for any fraud, but for the money which the defendant had so received, and which, being so received, he had no right to retain. This state of facts does not necessarily require an action to be brought for a tort, even if it allows one to be so brought. Such facts always raised in law the implied promise which was the contract cause of action in *indebitatus assumpsit* for money had and received. Having money that rightfully belongs to another creates a debt; and wherever a debt exists without an express promise to pay, the law implies a promise, and the action always sounds in contract."

This was the point passed upon by the court in that case; and while there was some talk on the other proposition, it is especially announced at the conclusion of the opinion that the court did not pass upon the question whether, assuming the action to be for tort, it was of such a character as to be assignable.

There seems to be a very warm contention between the attorneys for the respondents and appellant as to what was actually decided in *Cleveland Coal Co. v. Sloan*, 90 Ky. 808.

We think, upon a careful reading of that case, that it sub-

stantially supports appellant's contention, although the language of the opinion seems somewhat contradictory; but the court certainly undertook to hold that damage to the credit of the firm was not a personal injury. We think, however, that the great weight of authority supports the contention of respondents, and that most of the cases cited in respondents' brief sustain that contention, especially the cases which interpret and construe the United States bankruptcy law, which, we think, is more liberal in relation to the survival of actions than the statutes of the state of Washington. The cases are cited in respondents' brief, and a re-citation is unnecessary here, especially as an analysis of such cases would render this opinion too long. We think the appellant was allowed to prove all the damages that he was entitled to prove, and that therefore no error was committed in the rejection of the proof offered. Many points are raised in respondents' brief against the validity of the judgment obtained, but as it does not appear from the record that respondents perfected their appeal from said judgment, we have not considered them.

The judgment is affirmed.

ASSIGNMENT—RIGHT OF ACTION FOR PERSONAL TORTS.—A claim for damages arising from a personal injury is not assignable: *Jones v. Mathews*, 75 Tex. 1; *Hunt v. Conrad*, 47 Minn. 557. An assignment cannot be made of a cause of action arising from personal injuries resulting in a loss of business: *Murray v. Buck*, 76 Wis. 657; 20 Am. St. Rep. 92, and note. An assignment of the right to complain of fraud is against public policy, and void; *Sanborn v. Doe*, 92 Cal. 152; 27 Am. St. Rep. 101, and note. See also note to *McKee v. Judd*, 64 Am. Dec. 516, 517.

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AGENCY.

1. **NOTICE TO AN AGENT OR ATTORNEY** is notice to the principal, when it comes to the agent or attorney in such manner that he may communi-

cate it to his principal, or act upon it without any violation of duty. *Littauer v. Honck*, 572.

2. **EMPLOYMENT IN WRITING** is not necessary to authorize an agent to act for a corporation in raising or otherwise improving a canal, and it may therefore be held answerable for his wrongful act in causing the land of a private proprietor to be plowed up, and part of the surface thereof used in improving the canal. *Williams v. Fresno Canal etc. Co.*, 172.
 3. **RATIFICATION.** — Though a power of attorney to sell land does not authorize a conveyance to be made, yet if the agent, acting under the power, makes a conveyance as well as a sale, and the principal, being informed thereof, approves what has been done in his name, and accepts notes and mortgages given by the purchaser, and insists upon their payment, he ratifies the conveyance, and the effect of the power of attorney under which the agent acted becomes immaterial. *Delano v. Jacoby*, 201.
 4. **POWER OF ATTORNEY, WHEN AUTHORIZES A CONVEYANCE.** — Mere authority to sell does not, as a general rule, in the absence of any words or circumstances qualifying the language, empower the attorney to execute a conveyance. *Delano v. Jacoby*, 201.
 5. **DEEDS — REGISTRY ACTS.** — A POWER OF ATTORNEY to convey real property, otherwise valid, is good between the parties, whether acknowledged and recorded or not. *Delano v. Jacoby*, 201.
- See CORPORATIONS, 3; COUNTIES, 2; DEEDS, 3; INSURANCE, 1; NEGOTIABLE INSTRUMENTS, 4; VENDOR AND PURCHASER.

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APPEAL

1. **JUDGMENTS.** — **APPEAL BOND SERVES TO SUSPEND THE ENFORCEMENT OF THE JUDGMENT** pending the appeal, and to give the appellee additional security for his debt in case the judgment is affirmed or the appeal dismissed; but it is not a substitute for the judgment appealed from, nor does the appellee receive it in satisfaction thereof. *Rockwell v. District Court*, 265.
2. **MISTAKE, RELIEF FROM.** — If the failure to serve notice of appeal upon co-parties is due to accident or mistake of fact, the appellate court may relieve against the mistake, and is not bound to dismiss the appeal. *Hutts v. Martin*, 412.
3. **OBJECTION, WHEN WAIVED.** — An objection to the failure of the court to charge the jury upon a specific point cannot be raised for the first time by an assignment of error to the appellate court. *People v. Baker*, 575.
4. **THE APPELLEE MAY, IN INDIANA,** properly save a question and duly present it by the assignment of cross-errors, and when he does so, he may, in many instances, accomplish as much as if he had himself presented the appeal. *Potoka Township v. Hopkins*, 417.
5. **INSTRUCTIONS — REVERSIBLE ERROR.** — The giving of an instruction which is misleading as to the issue, inapplicable to the evidence, and calculated

to prejudice the substantial rights of the losing party entitles him to a reversal. *Perot v. Cooper*, 258.

6. **INSTRUCTIONS — INACCURACY IN, WHEN WILL NOT REVERSE.** — Though instructions given are faulty and inaccurate, the judgment will not be reversed when the record demonstrates that they were properly understood by the jury, and that it was not misled, nor the parties injuriously affected thereby. *McNulta v. Lockridge*, 362.
 7. **QUESTIONS OF FACT, CONCLUSION OF TRIAL COURT ON, SUSTAINED BY SUPREME COURT WHEN.** — The conclusions reached by the trial court upon questions of fact will be sustained by the supreme court, unless such conclusions are without any testimony to sustain them, or are manifestly against the weight of the evidence. *Sullivan v. Suong*, 365.
 8. **THE EFFECT OF THE REVERSAL OF A JUDGMENT** is to leave the parties where they stood before its rendition. *Ward v. Marshall*, 198.
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ASSAULT.

1. **SHOOTING INTO A CROWD.** — When a person shoots a loaded gun into a crowd of persons, with intent to wound any of them, he may be convicted of an assault with intent to do great bodily harm to the person wounded, although he had no specific intent to wound that particular person. *People v. Raher*, 575.
2. **DAMAGES — "SMART-MONEY."** — In an action for assault and battery, the plaintiff is entitled to recover such exemplary damages as will compensate him for the injury done him by the malicious and wanton act of the defendant, but the latter cannot be punished beyond this by compelling him to also pay "smart-money" as a punishment for such act. *Stuyvesant v. Wilcox*, 580.

See SHIPPING; TRIAL, 2.

ASSIGNMENT.

MERE PERSONAL TORTS THAT DIE WITH THE PARTY NOT ASSIGNABLE. — Mere personal torts that die with the party, and do not survive to his personal representative, are not capable of passing by assignment.

Where, therefore, an insolvent debtor makes an assignment for the benefit of his creditors, his assignee cannot maintain an action against an attaching creditor and the sheriff for injury to the business credit and reputation of his assignor, resulting from the alleged malicious levy of a writ of attachment made prior to the assignment. *Slanses v. Schwaebler*, 948.

See BANKS, 7; CORPORATIONS, 10; DEEDS, 12, 13; INSURANCE, 8, 7; LAW PRACTICE, 2.

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ASSOCIATIONS.

CHANGE IN ARTICLES OF INCORPORATION OF BENEFIT SOCIETY DO NOT AFFECT PREVIOUSLY ISSUED CERTIFICATE WHEN. — When the original agreement between a mutual benefit association and a holder of a certificate therein contains no provision that he shall be bound by all articles and by-laws that may be adopted by the association, it cannot, by the adoption of new articles of incorporation, create a new condition of forfeiture of the certificate without his consent. *Hobbs v. Iowa Mut. Ben. Ass'n*, 466.

See INSURANCE, 9, 10.

ASSUMPTION OF RISK.

See MASTER AND SERVANT, 19, 21-27; RAILROADS, 22.

ATTACHMENT.

See ASSIGNMENT.

ATTORNEY AND CLIENT.

1. **DUTIES AND OBLIGATIONS.** — An attorney at law owes his client the duty of fidelity, but he also owes the duty of good faith and honorable dealing to the courts before whom he practices his profession. He is an officer of the court, and his high vocation is to correctly inform the court upon the law and facts of the case, and to aid it in doing justice and arriving at correct conclusions. He violates his oath of office when he resorts to deception, or allows his client to do so. He is under no obligation to seek to obtain for those whom he represents that which is forbidden by law. *People v. Beuthe*, 384.
2. **UNRECORDED MORTGAGE.—NOTICE TO ATTORNEY AS NOTICE TO CLIENT.** — Although a chattel mortgagee fails to file his mortgage in the proper office for record, yet the mortgaged property is not subject to execution against the mortgagor, issued under a judgment in favor of a third person, for a debt contracted before the execution of the mortgage, when the attorney and agent of such third person had actual notice and knowledge of such mortgage lien prior to the recovery of the judgment, and the levy of execution thereunder. *Littauer v. Housh*, 572.
3. **PRIVILEGED COMMUNICATIONS.** — A communication from a client to an attorney, though made in the presence of a third person, cannot be dis-

closed by the attorney without the consent of the client. *Blunt v. Kington*, 554.

4. **DISBARMENT OF—CAUSE FOR.** — When an attorney at law procures a decree of divorce by introducing before the court testimony which he knows to be false and perjured, he is guilty of such unprofessional conduct as justifies his disbarment. *People v. Beattie*, 384.
5. **DISBARMENT—CAUSE FOR.** — When an attorney at law in an action for divorce permits his client to swear falsely to the jurisdictional fact of her residence, knowing her evidence to be false, and not informing the court of its falsity, and then introduces other evidence depending for its materiality upon such false evidence, such conduct is ground for his disbarment. *People v. Beattie*, 384.
6. **CAUSE FOR DISBARMENT.** — An attorney who suffers false and perjured testimony to be presented to the court, with the possible result of inducing the latter to take jurisdiction of a case in which there would otherwise be no power to act, and to grant a judgment or decree which the law would prohibit if the real character of the offered evidence were known, cannot shield himself behind his supposed obligations to his client. Such conduct justifies the court in revoking his license, and striking his name from the roll of attorneys. *People v. Beattie*, 384.
7. **CAUSE FOR DISBARMENT.** — When an attorney in an action for divorce gives his client a paper purporting to be a certified copy of a decree of divorce, and thereby leads her to believe that she has been divorced by proceedings already had in court, and thereby also induces, enables, and assists her in procuring a marriage license and contracting marriage before obtaining a divorce, when he well knows, as a matter of fact, that no decree of divorce has yet been rendered or entered, or will be rendered or entered for some time thereafter, he is guilty of professional misconduct justifying his disbarment. *People v. Beattie*, 384.

See AGENCY, 1; GUARDIAN AND WARD, 2; JUDGMENTS, 22, 23.

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BANKS.

1. **CHECKS—RIGHTS OF HOLDERS.** — As between the parties to a check, the bank is the principal debtor to the payee or holder of a check drawn on funds on deposit, but the drawer is still liable, as surety at least, and is at liberty at any time, by paying and taking up his check, to reinvest himself with the legal title to the money on deposit. *Metropolitan Nat. Bank v. Jones*, 403.
2. **CHECKS—EFFECT OF CERTIFICATION.** — As between the bank certifying a check and the drawer, the certification has the same effect as payment,

the funds representing the amount of the check being as effectually withdrawn from the control of the drawer, and the indebtedness from the bank to the depositor, created by the deposit, being as effectually satisfied to that amount, in the one case as in the other. *Metropolitan Nat. Bank v. Jones*, 403.

2. CHECKS—EFFECT OF CERTIFICATION. — A bank, by certification of a check, becomes entitled to charge the amount thereof to the account of the drawer at the time of certification, thus appropriating to the payment of the check the necessary amount of money on deposit to the credit of the drawer. *Metropolitan Nat. Bank v. Jones*, 403.
4. CHECKS—EFFECT OF CERTIFICATION. — The liability of a bank after certification of a check is independent of the question of its possession of the requisite amount of funds of the drawer, it being by the act of certification estopped to deny the possession of sufficient funds. *Metropolitan Nat. Bank v. Jones*, 403.
5. CHECKS—EFFECT OF CERTIFICATION OF. — By certification of a check the bank enters into an absolute undertaking to pay it when presented at any time within the period of limitation of actions. The transaction between the holder and the bank is, in legal effect, the same as though the holder had received payment, and had deposited the money with the bank, and received a certificate of deposit therefor. *Metropolitan Nat. Bank v. Jones*, 403.
6. CHECKS—EFFECT OF CERTIFICATION OF. — When the holder, on making presentment of a check to the bank, instead of demanding and receiving payment, has the check certified, and retains it in his possession, he enters into a new and express contract with the bank, not within the scope of the legal relations of the parties, nor within the presumed intention of the drawer. *Metropolitan Nat. Bank v. Jones*, 403.
7. CHECK AS APPROPRIATION OF DEPOSIT. — The giving of a check by a bank depositor operates, at least after presentment, as an assignment to the holder of a sufficient amount of the deposit to pay the check, and is, therefore, a definite appropriation of that sum to its payment, binding upon all the parties to the check. *Metropolitan Nat. Bank v. Jones*, 403.
8. CHECKS—EFFECT OF CERTIFICATION BEFORE DELIVERY. — When the drawer of a check procures its certification by the bank before its delivery to the drawee, the drawer is liable upon non-payment on presentation to the bank. *Metropolitan Nat. Bank v. Jones*, 403.
9. CERTIFICATION OF CHECK—EFFECT OF—DISCHARGE OF HOLDER. — When the holder of a check presents it and procures it to be certified by the bank instead of being paid, such certification is, as between the holder and the drawer, a payment, and discharges the drawer from liability, and its presentment on the next business day after its issue and non-payment will not revive the drawer's liability. *Metropolitan Nat. Bank v. Jones*, 403.
10. CERTIFICATION OF CHECK RELEASES DRAWER. — A bank, by certifying a check, becomes the principal and only debtor, and the holder, by taking a certificate of the check from the bank, instead of requiring payment, discharges the drawer, and the check then circulates as the representative of so much cash in bank, payable on demand to the holder. *Metropolitan Nat. Bank v. Jones*, 403.

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WILLS — INOPERATIVE TRUSTS. — A bequest in trust, without a declaration of the beneficiaries on the face of the will, or by some other writing that can be regarded as part of it, is no bequest at all, so far as the beneficial interest is concerned, and it vests by law in the heir of the testator. *Holdenheimer v. Bauman*, 29.

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See ATTORNEY AND CLIENT, 2; PARTNERSHIP, 2.

CHECKS.

1. BANKS AND BANKING. — A CHECK PAYABLE AT A FUTURE DAY must be treated as a check, rather than as a bill of exchange, and is not entitled to days of grace. *Way v. Towle*, 552.
2. BANKS AND BANKING — RIGHTS OF PARTIES TO — ACCEPTANCE OF. — There is no such thing as "acceptance" of checks in the ordinary sense of the term. A check being payable immediately and on demand, the holder can only present it for payment, and the bank can fulfill its duty to the depositor only by paying the amount demanded. The holder has no right to demand from the bank anything but payment of the check, and the bank has no right, as against the drawer, to do anything but pay it. *Metropolitan Nat. Bank v. Jones*, 403.

See BANKS.

CLERK OF COURT.

See EXECUTION, 1, 2, 4.

CLOUD ON TITLE.

See FRAUDULENT CONVEYANCES, 4.

COLLATERAL ATTACK.

See GUARDIAN AND WARD, 2; JUDGMENTS, 1, 5, 6.

COLLATERAL SECURITY.

See NEGOTIABLE INSTRUMENTS, 4, 5.

COLLUSION.

See INJUNCTIONS; PARTNERSHIP, 2.

COMITY.

See EXTRADITION, 1.

COMMERCE.

See INTERSTATE COMMERCE; WHEATERS.

COMMISSIONERS.

See MANDAMUS, 6; RAILROADS, 15, 16, 30; STATUTES, 11, 12.

COMMUNITY PROPERTY.

See ACKNOWLEDGMENTS; HUSBAND AND WIFE, 8.

COMPLAINT.

See PLEADING, 1, 2.

COMPROMISE.

See INFANTS; TRIAL, 12.

CONDEMNATION.

See EMINENT DOMAIN.

CONFLICT OF LAWS.

See EXECUTORS AND ADMINISTRATORS, 2; NEGLIGENCE, 2; STATES, 2.

CONGRESS.

See STATUTES, 20.

CONNECTING CARRIERS.

See RAILROADS, 11-16; TELEGRAPHS.

CONSIDERATION.

See CORPORATIONS, 10; DEEDS, 1, 6-9; EVIDENCE, 2; FRAUD, 3; HUSBAND AND WIFE, 5; INSURANCE, 8; LICENSE, 3, 9; NEGOTIABLE INSTRUMENTS, 1, 2; PLEADING, 7, 8; RAILROADS, 9; REWARDS, 2; SURETSHIP, 3; TRIAL, 2; VENDOR AND PURCHASER, 4; WATERS, 18.

CONSPIRACY.

See INJUNCTIONS, 1.

CONSTITUTIONAL LAW.

See CRIMINAL LAW; ELECTIONS, 1; REAL PROPERTY, 3; STATUTES.

CONSTITUTIONS.

1. **LEGISLATIVE, EXECUTIVE, AND JUDICIAL DEPARTMENTS** of state government are distinct from each other, and, so far as any direct control or interference is concerned, are independent of each other; but the power of either department is not absolute, and may be incidentally affected by the action of another department. Each department is a check upon the exercise of arbitrary power by another department. *Greenwood Cemetery etc. Co. v. Routt*, 284.
2. **EFFECT OF FIFTEENTH AMENDMENT.** — The only limitation placed upon the power of the state by the adoption of the fifteenth amendment to the federal constitution is, that in any case where the right of suffrage is involved, the class protected by this amendment shall not be discriminated against. *McPherson v. Blacker*, 587.
3. **FINE NOT EXCESSIVE WITHIN MEANING OF CONSTITUTION WHEN.** — A fine of not less than one thousand dollars nor more than five thousand dollars for a first violation of any of the provisions of a statute providing for the establishment of joint through rates of transportation upon railroads, and of not less than five thousand dollars nor more than ten thousand dollars for a subsequent violation thereof, is not excessive within the meaning of the constitution of Iowa. *Burkington etc. Ry Co. v. Day*, 477.
4. **ELECTION OF PRESIDENTIAL ELECTORS.** — A state statute providing for the election of presidential electors by congressional districts, instead of by the state at large, does not violate section 1 of article 2 of the constitution of the United States, relating to the appointment of such electors by the state. This section must be construed as conferring on the state legislature plenary power to prescribe the method of choosing electors, and not as requiring the state, in appointing them, to act as a unit. *McPherson v. Blacker*, 587.
5. **ELECTION OF PRESIDENTIAL ELECTORS.** — The fact that at the time of the adoption of the fourteenth and fifteenth amendments to the federal constitution the method of choosing presidential electors actually in vogue in all the states was by vote of the people at large for a general ticket does not affect the right of the state to provide by statute for the election of such electors by congressional districts, instead of by the voters of the state at large. *McPherson v. Blacker*, 587.
6. **ELECTION OF PRESIDENTIAL ELECTORS.** — Under section 1 of article 2 of the federal constitution, the legislatures of the several states have exclusive power to direct the manner in which presidential electors shall be appointed, and such appointment may be made by the legislature direct, by popular vote in districts, or by general ticket, as provided by state statute. This power is not affected by the fourteenth and fifteenth amendments to such constitution. They do not limit the power of appointment to the particular method pursued at the time of their adoption. *McPherson v. Blacker*, 587.
7. **REMEDIES.** — IF A STATE CONSTITUTION DECLARES THAT A LIABILITY SHALL EXIST in certain specified circumstances, an action may be maintained to enforce such liability, without there being any legislation upon the subject. Otherwise the legislature, by its inaction, might deprive the parties of rights guaranteed to them by the constitution. *Willis v. Mabon*, 626.
8. **A PROVISION OF A STATE CONSTITUTION MUST BE REGARDED AS SELF-EXECUTING**, if the nature and extent of the right conferred and the

Liability imposed are fixed by the constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action. *Wills v. Mabon*, 628.

9. CORPORATE LIABILITY OF STOCKHOLDER, PROVISION CONCERNING, IS SELF-EXECUTING. — The clause in the state constitution of Minnesota declaring that each stockholder shall be liable for the debts of the corporation to the amount of the stock held by him is self-executing. *Wills v. Mabon*, 628.

CONTEMPT.

1. PUNISHMENT FOR CONTEMPT OF COURT cannot be broken up into portions. The judgment inflicting it must be entire and final for the particular contempt. *O'Rourke v. Cleveland*, 719.
 2. VOID JUDGMENT. — A judgment requiring a party found guilty of contempt of court to pay costs and a counsel fee, and to await further punishment in the pleasure of the court, is void. *O'Rourke v. Cleveland*, 719.
 3. COUNSEL FEES AS PUNISHMENT. — Payment of counsel fees cannot be imposed upon a party as punishment for his contempt of court. *O'Rourke v. Cleveland*, 719.
- See CORPORATIONS, 15; EMINENT DOMAIN, 1; EXTRADITION; HABEAS CORPUS; MANDAMUS, 4; MUNICIPAL CORPORATIONS, 2, 3; RAILROADS, 15, 16; STATES; STATUTES, 10, 13, 15, 16, 18; TRIAL, 7, 8; WAYERS, 6.

CONSTRUCTION.

See STATUTES, 3, 4.

CONSTRUCTIVE SERVICE.

See JUDGMENTS, 1-4; TRESPASS TO TRY TITLE, 2.

CONTRACTORS.

See MASTER AND SERVANT, 1, 2; MECHANIC'S LIEN, 1, 4.

CONTRACTS.

1. AMOUNT OF WORK DONE ASCERTAINED IN MODE DIFFERENT FROM THAT AGREED ON, WHEN LATTER MADE IMPOSSIBLE. — Where certain work of grading for a railroad has been done at fixed prices, under an agreement that the amount of the work is to be ascertained by a remeasurement thereof, to be made by certain engineers, and that mode of ascertainment becomes impossible without the fault of either party, the amount of the work done may be ascertained from other competent testimony, and the court may base a decree upon such testimony. *Sullivan v. Suong*, 865.
2. STATUTE OF FRAUDS — CONTRACT NOT TO BE PERFORMED WITHIN A YEAR. — A contract between promoters of a corporation and another person, that he will serve the corporation for the period of one year after its organization, is not within the statute of frauds, because the contracts so far as the corporation is concerned, could have no existence until after its organization. *McArthur v. Times' Printing Co.*, 853.
3. CONTRACTS IN RESTRAINT OF TRADE, WHAT ARE. — A contract between corporations engaged in the manufacture and sale of dynamite, to the effect that none of them shall make any shipment to any part of the

United States lying east of the eastern boundaries of Montana, Wyoming, Colorado, and New Mexico; that with respect to the territory west of such boundaries, none of the parties shall become interested in the manufacture and sale of dynamite, except under the provisions of the contract, and that of the aggregate quantity of the dynamite to be sold, the several parties may sell only such proportion as is designated in the contract, and should either sell in excess of such proportion, it should pay over to the other parties the profits of such excess; and that a committee to be appointed by the parties to the contract shall fix the price at which the dynamite may be sold in the states and territories embraced within the agreement, — is invalid, under a statute declaring that every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void. *Vulcan Powder Co. v. Hercules Powder Co.*, 242.

4. **CONTRACTS IN RESTRAINT OF TRADE — PATENT RIGHTS.** — The fact that one of the parties to a contract was the owner of letters patent for certain methods and processes of making dynamite will not render valid a contract, otherwise void as in restraint of trade, whereby all the parties to the contract agree not to be interested in the manufacture or sale of dynamite except in certain states and territories, and that even in those states and territories each of them shall manufacture and sell a certain quantity only, and at a price to be fixed by a committee to be appointed. *Vulcan Powder Co. v. Hercules Powder Co.*, 242.

5. **CONTRACT IN RESTRAINT OF TRADE CANNOT GIVE RISE TO A CAUSE OF ACTION.** — The court will leave each of the parties where it finds him. If it was a part of such contract that if either of the parties should sell beyond a designated proportion of dynamite he would account to the others for the profits derived by him therefrom, the court will not compel him to submit to an examination of his books, and to account for such sum as may be found due from him according to the provisions of the contract. *Vulcan Powder Co. v. Hercules Powder Co.*, 242.

See **BANKS**, 6; **CORPORATIONS**, 3-5, 13; **DEEDS**, 2, 7, 8; **EVIDENCE**, 4; **FRAUD**, 2, 3; **INSURANCE**, 1, 6, 7; **LICENSE**, 3; **MASTER AND SERVANT**, 1, 2; **MERCHANT'S LIEN**, 2; **PLEADING**, 2, 7; **PUBLIC LANDS**, 3; **RAILROADS**, 9, 11, 12; **SALES**; **SERVICES**; **SPECIFIC PERFORMANCE**; **SURETSHIP**, 1, 2; **VENDOR AND PURCHASER**, 5, 6, 9.

CONTRIBUTORY NEGLIGENCE.

See **MASTER AND SERVANT**, 17, 18, 20; **MUNICIPAL CORPORATIONS**, 10, 12; **NEGLIGENCE**, 1, 5, 6; **WITNESSES**, 1.

CONVERSION.

See **LARCENY**, 2.

CONVEYANCES.

See **AGENCY**, 3-5; **DEEDS**; **FRAUDULENT CONVEYANCES**; **HUSBAND AND WIFE**, 3, 4; **LICENSE**, 7; **MORTGAGES**; **POWERS**; **REAL PROPERTY**; **VENDOR AND PURCHASER**.

CORPORATIONS.

1. **IMMUNITY FROM LIABILITY OF CORPORATION DOES NOT EXTEND TO ACTS ULTRA VIRES.** — The immunity from liability of a corporation exercising a delegated authority for the public benefit for a private injury,

- where the damage sustained is the result of the proper exercise of the power or privilege conferred by law, does not extend to acts that are *ultra vires*, or that are equivalent to a confiscation or condemnation of property rights of the citizen, unless provision is made for due compensation. *Hudson River Telephone Co. v. Waterlot Turnpike etc. Co.*, 838.
2. **DECLARATIONS OF THE OFFICERS OF A CORPORATION** bind it only when made in the course of the performance of their authorized duties, so that such declarations constitute part of the *res gestae*. *Browning v. Hinkle*, 691.
 3. **CONTRACTS MADE BY PROMOTERS OF A CORPORATION** in anticipation of its organization may be ratified by it after its incorporation, and such ratification may be inferred from acts or acquiescence on its part, or that of its authorized agents, as well as from the formal action of its board of directors. *McArthur v. Times Printing Co.*, 653.
 4. **PROMOTERS, CONTRACTS WITH.** — If persons engaged in procuring the organization of a corporation to publish a newspaper enter into a contract with another person for his services as advertising solicitor for such newspaper for one year, and he, after the corporation is perfected, enters its services pursuant to his contract, with the knowledge of its officers, and continues in such service for some months, the corporation may be deemed to have adopted the contract of its promoters, and held liable thereon. *McArthur v. Times Printing Co.*, 653.
 5. **PROMOTERS' CONTRACT.** — IF A CORPORATION ADOPTS A CONTRACT made by its promoters, such adoption cannot relate back to the making of the contract by the promoter; for the corporation having at that time no existence, and no power to contract, no act on its part can ratify such a contract as of a date anterior to the creation of the corporation. *McArthur v. Times Printing Co.*, 653.
 6. **THE PROPERTY OF A CORPORATION IS A TRUST FUND** for the payment of its debts, in the sense that when it is lawfully dissolved all its creditors are entitled in equity to have their debts paid out of such property before any distribution thereof is made among the stockholders, and also in the sense that any conveyance of the property of the corporation, without authority of law and in fraud of existing creditors, is void against them. *Hoeses v. Northwestern Mfg. Co.*, 637.
 7. **UNPAID SUBSCRIPTION FOR STOCK DOES NOT CONSTITUTE A TRUST FUND** for the payment of creditors of the corporation to any greater extent than any other of its assets, and whether the issuing of stock without exacting payment therefor constitutes a fraud upon creditors is to be determined upon the same principle as if the controversy related to some other assets of the corporation. *Hoeses v. Northwestern Mfg. Co.*, 637.
 8. **UNPAID SUBSCRIPTION FOR STOCK CANNOT BE RECOVERED** by creditors of the corporation when the corporation itself never had any such right. Hence if stock is issued by a corporation upon contract that it shall not be paid for, its creditors cannot recover payment for such stock on account of the implied promise of the persons receiving it that such payment will be made. If the creditors have rights of action in such a case superior to those of the corporation, they must be based upon tort or fraud, actual or implied. *Hoeses v. Northwestern Mfg. Co.*, 637.
 9. **BONUS STOCK.** — A CREDITOR WHO SEEKS TO COMPEL PAYMENT FOR BONUS STOCK need not allege that he believed such stock to have been paid for when he became such creditor, and that he relied upon the

- apparent capital of the corporation. If he had knowledge of the arrangement under which the stock was issued, that must be pleaded as a matter of defense. *Hoeses v. Northwestern Mfg. Co.*, 637.
10. BONUS STOCK — PLEADING. — ASSIGNER SEEKING TO COMPEL THE HOLDERS OF BONUS STOCK to make payment therefor, and whose claims were acquired after the corporation became insolvent, should state what he paid for such claims, or, at least, aver that he paid some substantial consideration. If he bought up the claims for a mere song, for the purpose of speculating on the liability of stockholders, no court would grant him relief. *Hoeses v. Northwestern Mfg. Co.*, 637.
 11. BONUS STOCK. — PERSONS DEALING WITH A CORPORATION, IN THE ABSENCE OF KNOWLEDGE TO THE CONTRARY, have the right to assume that it has a paid-in capital to the amount which it represents itself as having, and if they give credit on the faith of that representation, and the corporation becomes insolvent, one who has received bonus stock without making payment therefor may be compelled to make such payment, but it is only those creditors who may be fairly presumed to have relied upon the apparent amount of capital in whose favor the law will recognize and enforce an equity against the holders of bonus stock. *Hoeses v. Northwestern Mfg. Co.*, 637.
 12. IN THE CASE OF THE ISSUE OF BONUS STOCK, AN EQUITY does not lie, in favor of all the creditors of the corporation, entitling them to compel payment therefor. Such an equity does not exist in favor of a creditor whose demand accrued prior to such issue, nor in favor of a creditor whose demand was thereafter contracted with full knowledge of the arrangement by which the bonus stock was issued, for one cannot be defrauded by that which he knows when he acted. *Hoeses v. Northwestern Mfg. Co.*, 637.
 13. STATUTE FORBIDDING THE ISSUING OF STOCK WHICH IS NOT PAID FOR does not create an implied contract that one who receive bonus stock without payment will pay therefor, though it may make such issue void and *ultra vires*. *Hoeses v. Northwestern Mfg. Co.*, 637.
 14. CORPORATE LIABILITY OF STOCKHOLDERS, WHO MAY ENFORCE. — The individual liability of stockholders for corporate debts may be enforced in a sequestration proceeding against the corporation, under chapter 76 of the General Statutes of Minnesota, upon the application of any creditor who is a party to the proceeding. *Hoeses v. Northwestern Mfg. Co.*, 637.
 15. CONSTITUTIONAL LIABILITY — CORPORATE LIABILITY OF STOCKHOLDER. — Under a provision of a state constitution declaring that each stockholder in a corporation shall be liable to the amount of the stock held by him, each is liable for corporate debts, in addition to the risk of losing the amount of his stock, though he has paid therefor in full. *Willis v. Mabon*, 626.
 16. INSOLVENCY OF CORPORATION — EFFECT ON LIABILITY OF STOCKHOLDERS. — If a corporation is adjudged to be insolvent upon the petition of its creditors, and a receiver is appointed, who administers its assets and distributes their proceeds among those creditors, who executed releases as required by statute, such releases do not affect the personal liability of the stockholders, if the statute declares that a release executed thereunder shall not operate to discharge any other party liable as surety, guarantor, or otherwise, for the same debt. *Willis v. Mabon*, 626.
 17. ONE SUEED FOR THE PRICE OF STOCK ISSUED TO HIM CANNOT escape his obligation to pay therefor by proving that certain officers of the

corporation told him that such stock had been paid for by another person, unless he further proves that in making such declaration such officer was acting for the corporation and clothed with authority to speak for it. *Browning v. Hinkle*, 691.

See AGENCY, 2; CONSTITUTIONS, 9; CONTRACTS, 2; LIBLEL, 4-6; LIMITATIONS ON ACTIONS, 1.

COSTS.

See CONTEMPT, 2; INJUNCTION, 4; JUDGMENTS, 2.

CO-TENANCY.

See DOWER; PARTITION, 2.

COUNSEL.

See MALICIOUS PROSECUTION, 2; TRIAL, 10.

COUNTIES.

1. LIABILITY FOR DEFECTIVE BRIDGES. — A county is not liable for injuries caused by a defective bridge, in the absence of a statute creating such liability, either expressly or by necessary implication. *Helgel v. Wickita County*, 63.

2. LIABILITY FOR NEGLIGENCE OF OFFICERS. — In the absence of a statute imposing liability, a county is not liable for injuries resulting from the negligence of its officers or agents. *Helgel v. Wickita County*, 63.

See EXECUTION, 3; MUNICIPAL CORPORATIONS, 14.

COUPONS.

See TRUSTS, 11, 12.

COURTS.

COURTS DE FACTO. — Such a thing as a *de facto* court cannot exist, and consequently its judgments cannot be sustained. *Gorman v. People*, 350.

See ATTORNEY AND CLIENT, 1; CONTEMPT; CRIMINAL LAW, 1; FRAUDULENT CONVEYANCE, 2; GUARDIAN AND WARD, 1; HIGHWAYS; INFANTS; JUDGMENTS; JURISDICTION; LOCKER, 9; MICHAMUS'S LEIN, 2; PLEADING, 11; RECOVERIES, 2, 3; STATUTES, 2, 17.

COVENANTS.

See RAILROADS, 2.

CREDITOR'S SUIT.

RESULTING TRUSTS. — If the statute of a state provides that when property purchased by the debtor is conveyed to a third person, with intent to defraud the creditors of such debtor, a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their demands, they may, if residents of the state, prosecute an action to enforce such trust, without first obtaining judgment on their demand, if their debtor is a non-resident of the state, and has no property therein which can be appropriated to the satisfaction of the debt by legal proceedings. *Overwire v. Haworth*, 660.

CRIME.

See **LABEL**, 2, 7, 8.

CRIMINAL LAW.

1. **CONTRACT OF LAWS—PROSECUTIONS, UNDER WHICH LAW TO BE CONDUCTED.** — A statute declaring that no grand jury shall hereafter be summoned or required to attend the sittings of any district court, unless ordered by the judge thereof, and providing for prosecutions by indictment, applies to the prosecution of crimes alleged to have been committed prior to its enactment. *In re Wright*, 94.
 2. **CONSTITUTIONAL LAW.—PROSECUTION BY INFORMATION, INSTEAD OF BY INDICTMENT,** is not a denial of due process of law. *In re Wright*, 94.
 3. **LAWS ARE EX POST FACTO** if they make an act criminal which, when it was committed, was innocent, or aggravate a crime and make it greater than when committed, or change the punishment and make it greater than that annexed to the crime when committed, or alter the rules of evidence so as to receive less or different testimony than that required at time of the commission of the offense charged, or otherwise alter the situation of the accused to his disadvantage. *In re Wright*, 94.
 4. **LAWS, EX POST FACTO.** — SO FAR AS MERE MODES OF PROCEDURE are concerned, a party has no more right in a criminal than in a civil action to insist that his cause be disposed of under the law in force when the act to be investigated is charged to have taken place. *In re Wright*, 94.
 5. **MALICE IMPLIED FROM USE OF DEADLY WEAPON.** — The law implies malice from the use of a deadly weapon, unless there are some circumstances of mitigation or excuse in the case. *State v. Jackson*, 890.
 6. **ALIBI, PROOF OF, MUST BE CLEAR AND CONVINCING.** — The evidence relied on to establish proof of an alibi must be sufficiently clear and convincing, to satisfy the jury that the preponderance of the evidence is in favor of the alibi; but it need not be sufficient to remove all reasonable doubt thereof. *State v. Jackson*, 890.
 7. **CONVICTION.** — A plea of guilty by or verdict against one accused of crime is a conviction. *Wilmoth v. Hensch*, 738.
- See **ASSAULT**, 1; **EMBELLISHMENT**; **EXTRADITION**; **FALSE IMPRISONMENT**, 2; **INJUNCTIONS**, 3; **LARCENY**; **REWARDS**; **SHIPPING**; **STATES**, 2; **STATUTES**, 6, 13; **TRIAL**, 11.

CROSS-BILL.

See **EQUITY**, 1; **PLEADING**, 6.

CUSTODY.

See **EXECUTION**, 5.

DAMAGES.

1. **INJURY TO PLAINTIFF'S FEELINGS** may be included as an element of damages in an action for making a false statement, the effect of which was to deprive him of employment. *Lombard v. Lannon*, 528.
2. **"SMART-MONEY" AS EXEMPLARY DAMAGES,** or any damages by way of punishment merely, cannot be recovered in any case. Damages to be awarded must never exceed compensation for the injury done. *Stuyvesant v. Wilcox*, 580.
3. **EXEMPLARY DAMAGES — RULE FOR.** — In cases calling for exemplary damages, only such an amount can be recovered as will fairly compensate the

party entitled to them. "Smart-money" in addition to this cannot be recovered by way of punishment for the wrong done. *Stuyvesant v. Wilson*, 590.

4. **DAMAGES IN ACTION FOR DEATH BY WRONGFUL ACT OF DEFENDANT.** — In an action for the death of a person, caused by the wrongful act of the defendant, the basis of recovery is the proof of pecuniary damage, and not the proof of the death, caused by the wrongful or negligent act of the defendant. *Klepek v. Donald*, 936.
 5. **PLEADING IN NEGLIGENCE CASE.** — In an action by a father to recover damages for the death of his minor son, caused by negligence, a general allegation of damage is sufficient to authorize the recovery of such damages as naturally and usually flow from the death. *Orman v. Mannix*, 340.
- See ASSAULT, 2; EMINENT DOMAIN, 3-5; EVIDENCE, 4; FALSE IMPRISONMENT; INFANTS; INTEREST; LIBEL, 7, 8; PLEADING, 2; PROBATE, 2; RAILROADS, 1, 2, 7, 9, 10, 13, 19, 26; REAL PROPERTY, 7; SURETYSHIP, 4; TELEGRAPHS, 2; TRIAL, 2, 5; WATERS, 5.

DAYS OF GRACE.

See CHECKS, 1.

DEATH.

See LICENSE, 6.

DEBTOR AND CREDITOR.

1. **PAYMENT — APPLICATION OF.** — A person indebted on separate and distinct accounts has the right to have his payments applied to such account as he shall direct. A creditor receiving the money with such direction is bound to give credit accordingly; but if a payment is made without direction as to its application, the creditor may apply it to any debt due him at the time from such debtor. *Perot v. Cooper*, 258.
 2. **PAYMENTS — IMPLIED APPLICATION OF.** — It is not always necessary that a debtor expressly direct the application of a payment made to his creditor, and if from the circumstances his purpose may be clearly implied, the creditor is bound to regard it. When a creditor claims that his debtor owes him upon two separate demands, one of which is admitted and the other disputed, a payment made by the debtor will be presumed, in the absence of evidence, to be made upon the demand admitted, rather than upon the one disputed, at the time of making such payment. So, also, an undesignated payment will be applied to an interest-bearing demand, rather than to one not bearing interest. *Perot v. Cooper*, 258.
- See ASSIGNMENT; BANKS, 1-10; CORPORATIONS, 6-9, 11, 12, 16; CREDITOR'S SUIT; EXECUTORS AND ADMINISTRATORS, 3; FRAUDULENT CONVEYANCES; HUSBAND AND WIFE, 4; SURETYSHIP, 6.

DECEDENT ESTATES.

See EXECUTORS AND ADMINISTRATORS.

DECLARATIONS.

See CORPORATIONS, 2, 17; EVIDENCE, 1; WILLS, 2.

DEEDS.

1. **WORDS IN, SUFFICIENT TO CONVEY ESTATE IN LAND.** — The following words in a deed from a grantor to a grantee, made in consideration of love and affection, are sufficient to convey an estate in the land, and operate to convey such an estate, and do not create a copartnership between the parties thereto: "Do give and release unto him so much land at, along, below, and above the mill-dam upon my land, known by the name of the Mill's Old Dam, and adjoining his, as will serve for the purpose of cutting a race, and for waste-way and mill, all conveniences in putting up same and lumber-yards, also free ingress and egress to and from said mill or pond through my lands, and also of backing water upon my land to the height of thirteen feet live water, and all the privileges of said mill two thirds of the time, reserving to myself one third part of said mill after paying one third part of whatever amount it may cost him in putting in operation said mill." *Jordan v. Neece*, 869.
2. **SUFFICIENCY OF.** — No precise technical words are required to be used in a conveyance of real estate. The use of any words which amount to a present contract of bargain and sale is sufficient. Whatever may be the inaccuracy of expression or the inaptness of the words used in the instrument, the courts will give effect to it, if an intention to pass the title can be discovered therefrom. *Harlowe v. Hudgins*, 21.
3. **DELIVERY OF DEED BY AGENT OF GRANTOR VALID WHEN.** — Where a deed is drawn up by the grantee, and sent to the grantor to be executed, with directions to record it, the recording officer, when the deed is delivered to him pursuant to such directions, becomes the agent of the grantee, and such delivery gives the deed full force. *Prignon v. Dausat*, 914.
4. **IF A GENERAL DESCRIPTION IS FOLLOWED BY A CLAUSE SUMMING UP** the intention of the parties as to the premises conveyed, such clause has a controlling effect upon all prior phrases used in the description. *Plummer v. Gould*, 567.
5. **BOUNDARIES — NORTH.** — If land intended to be conveyed is described in a deed as commencing at a point on the northwesterly line of H. Street, distant 125 feet north of the northeasterly line of Fourth Street, and running thence northeasterly along said northwesterly line of H. Street 25 feet, and extending back from H. Street 75 feet, the word "north" must be construed as meaning due north, and the place of commencement must be ascertained by finding a point on the northwesterly line of H. Street, which is 125 feet due north from a point on Fourth Street, though such point is less than 125 feet from the corner of H. and Fourth streets. *Currier v. Nelson*, 239.
6. **CONSIDERATION MERELY NOMINAL, DOES NOT CONSTITUTE GRANTEE PURCHASER FOR VALUE.** — A grantee of valuable property for a merely nominal money consideration actually paid, but where all the circumstances attending the transaction are indicative of a gift, is not a purchaser for a valuable consideration within the meaning of the recording act, and his deed, although recorded, conveys no title as against a prior unrecorded deed of the same property. To constitute a grantee a purchaser for value, the consideration of the grant must be not only good, but valuable, in the sense that a fair equivalent is given for the property granted. Where, therefore, the owner of a farm worth twenty thousand dollars conveys it to his wife, and six years after, and before the former deed is recorded, conveys it to his daughter by a deed reciting a

consideration of ten dollars and the annual payment to the grantor, during his lifetime, of the entire net proceeds of the farm, and of one third of such proceeds to his wife during her lifetime if she survived him, and of one third thereof to another daughter for the same period, and of one half of such proceeds to her after the death of both parents, giving to the grantee power to sell the property after her mother's death, the use of one half of the proceeds to be given to her sister during her life, the grantee under the second deed is not a subsequent purchaser for value within the meaning of the statute, and her deed, though first recorded, is no bar to an action of ejectment brought against her by the successors in interest of the grantee under the first deed. *Ten Eyck v. Witbeck*, 809.

7. **CONTRACT OF MARRIAGE VALUABLE CONSIDERATION FOR DEED, AND NEED NOT BE IN WRITING WHEN.** — A contract of marriage is not only a good, but also a valuable consideration for a deed. And where a deed recites that the consideration thereof is the promise of the grantee to marry the grantor, and is drafted by the grantee, and sent to the grantor for execution, it is not necessary, in order to render the consideration sufficient, that there should be a written memorandum of the contract of marriage signed by the grantee. *Prignon v. Dausset*, 914.
8. **VALIDITY OF, NOT AFFECTED BY ANYTHING THAT MAY HAPPEN AFTER ITS EXECUTION.** — When a deed is executed upon a good and valid consideration, the transaction is complete, and the deed will be unaffected by anything that may happen thereafter. Where, therefore, a grantee, at the time of the execution of a deed to her, in consideration of her promise to marry the grantor, is unaware of the intention of the grantor to defraud his creditors, the fact that she becomes aware of such fraudulent intent before she complies with her contract of marriage is not sufficient to avoid the deed, since the consideration for the deed is the agreement to marry, and not its actual consummation. *Prignon v. Dausset*, 914.
9. **UNRECORDED CONVEYANCES ARE VALID** against all persons, except subsequent purchasers and mortgagees in good faith and for a valuable consideration. *Warnock v. Harlow*, 209.
10. **UNRECORDED CONVEYANCES — SUBSEQUENT PURCHASERS, WHO ARE NOT.** — One who brings and successfully maintains an action to have the defendant declared to hold property in trust, and to compel a conveyance thereof, is not a subsequent purchaser, and no title he may acquire by virtue of the judgment in such action, and a conveyance made pursuant thereto, can have precedence over an unrecorded conveyance made by the defendant before the suit was brought. *Warnock v. Harlow*, 209.
11. **DEED SUBJECT TO MORTGAGE — EFFECT OF.** — When a conveyance of an entire estate is made, subject to a mortgage, the grantee takes only the equity of redemption, in the absence of specifications in the deed or of proof *alimede* to the contrary. *Stephens v. Clay*, 323.
12. **ASSIGNMENT OF — RECORD AS EVIDENCE.** — When the record of a deed is offered in evidence by consent, and the record shows, immediately following such deed, without any space or lines intervening, the following: "Assignment. — I assign the within to Elisabeth Graham, for value received of her," — followed by the signature and acknowledgment of the grantee named in the deed, both instruments purporting to be acknowledged before the same officer the same day, the record of both being apparently in the same handwriting, and with but a single file-mark for the record of both, the record of the assignment is admissible, in connec-

tion with the record of the deed, for the purpose of showing what the assignment refers to, and that in fact it was indorsed on the deed, and that it referred thereto and to the land therein described. *Harlowe v. Hudgins*, 21.

12. ASSIGNMENT OF. — An assignment in the following words, "I assign the within, for value received," indorsed upon and immediately following the words of a deed, and duly acknowledged and signed by the grantee named therein, is sufficient to vest the title to the land described in the deed in the assignee named in such assignment. *Harlowe v. Hudgins*, 21.

See EVIDENCE, 2; FRAUD, 3; LIMITATIONS OF ACTIONS, 2; LES FEEHOLD, 1; MORTGAGES, 1-5; REAL PROPERTY, 2.

DE FACTO.

See COURTS; OFFICERS, 1.

DEFINITIONS.

- "Acceptance." *Metropolitan Nat. Bank v. Jones*, 402.
 "Acquiring, possessing, and protecting property." *Commonwealth v. Parry*, 533.
 "All the evidence." *Gorman v. People*, 350.
 "At the time." *McNulta v. Lockridge*, 362.
 "Australian ballot system." *Allen v. Glynn*, 304.
 Fraud. *Metcalf v. Hart*, 122.
 "Heirs." *Jordan v. Nece*, 869.
 "I assign for value received." *Harlowe v. Hudgins*, 21.
 "Life lease." *Welsch v. London Assur. Corp.*, 788.
 Proximate cause. *Gonzales v. Galveston*, 17.
Respondeat superior. *McNulta v. Lockridge*, 362.
 "Shoot." *People's Gas Co. v. Tyner*, 433.
 "Shooting." *People's Gas Co. v. Tyner*, 433.
 "Smart-money." *Stuyvesant v. Wilcox*, 580.
 "Special." *Chicago etc. R'y Co. v. Titterington*, 29.
 "Through joint rates." *Burlington etc. R'y Co. v. Day*, 477.
 "Were arrested and lodged in jail to-day on charge of theft." *Rob v. Fuller*, 75.

DE JURE.

See OFFICERS, 1.

DELIVERY.

See BANKS, 8; DEEDS, 3; NEGOTIABLE INSTRUMENTS, 1, 4.

DEMURRER.

See PLEADING, 4, 5.

DEPOT.

See FRAUD, 3; RAILROADS, 9, 17, 18.

DESCENT.

WILLS. — IN THE ABSENCE OF A VALID TESTAMENTARY DISPOSITION by a testator of any part of his estate, it vests in his heir at law. *Heidenheimer v. Bauman*, 29.

DEVISE.

WILLS — INOPERATIVE TRUST VESTS BENEFICIAL INTEREST IN HEIR AT LAW. — When a bequest is declared upon its face to be upon such trusts as the testator has otherwise signified to the devisee, he takes no beneficial interest; and if the trusts are not sufficiently defined by the will, or other writing identified as part of it, the equitable interest goes to the heirs, or next of kin, as property of the deceased not disposed of by the will. *Heidenheimer v. Bauman*, 22.

See EXECUTORS AND ADMINISTRATORS, 1; TRUSTS, 4.

DIRECTORS.

See CORPORATIONS, 2.

DISBARMENT.

See ATTORNEY AND CLIENT, 4-7.

DISCRIMINATION.

See ELECTIONS, 1; STATUTES, 2.

DISMISSAL.

See APPEAL, 2.

DISSOLUTION.

See INJUNCTIONS, 5, 6; PARTNERSHIP, 2.

DISTRIBUTION.

See PARTITION, 2.

DITCHES.

See DRAINS; WATERS, 3, 12-13.

DIVERSION.

See WATERS, 4-10, 13, 13.

DOCKS.

See EMINENT DOMAIN, 2.

DOGS.

See MUNICIPAL CORPORATIONS, 4.

DOMICILE.

See EXECUTORS AND ADMINISTRATORS, 2; TAXES, 1.

DOWER.

2. **INCHOATE RIGHT OF, DEFEATED BY PARTITION SALE.** — The claim of a husband who acquires title to land as a tenant in common with others is subject to the paramount right of his co-tenants to demand partition. His wife's right of dower therein is therefore subordinate to that paramount right, which, when enforced by a sale made under a decree of the court, defeats her inchoate right of dower in the land, although she was not a party to the action for partition. *Holley v. Glover*, 833.

2. **EFFECT OF CONVEYANCE BY HUSBAND TO THIRD PERSON BEFORE PARTITION.** — Where a husband holding land as a tenant in common, in which his wife has an inchoate right of dower, conveys his interest to another person, and the land is thereafter sold under a decree of court in an action for partition to which the husband is a party, but not the wife, such right to dower is defeated, not because the husband was not the wife's representative, but by the exercise of the right of partition, which was paramount to it. The wife was not a necessary party to such action. *Holley v. Glover*, 883.

See REAL PROPERTY, 1.

DRAINS.

See HIGHWAYS; LICENSE, 5; MUNICIPAL CORPORATIONS, 2.

DUE PROCESS OF LAW.

See CRIMINAL LAW, 2; STATUTES, 11.

EASEMENTS.

See EJECTMENT, 1; LICENSE, 1; RAILROADS, 5.

EJECTMENT.

1. **EJECTMENT WILL LIE ONLY FOR THINGS** whereof possession may be delivered, and it will not lie for a mere license, an incorporeal hereditament, right of way, or an easement. *Hancock v. McAvoy*, 774.
2. **EJECTMENT FOR RIGHT OF INTERMENT IN BURIAL LOTS.** — The exclusive right of sepulture in the burying-ground of a cemetery corporation subject to its regulations is a mere license, and will not support an action of ejectment. *Hancock v. McAvoy*, 774.

See DEEDS, 6; EQUITY, 1.

ELECTIONS.

1. **CONSTITUTIONAL LAW — PARTY HEADINGS.** — A statute prescribing the form and contents of ballots to be voted at an election, and providing that a cross shall be stamped opposite the name of every candidate intended to be voted for, except that the names of political parties which have filed certificates of nominations made by them may be printed at the head of all ballots, and a person intending to vote for all the candidates of any of such parties may stamp a cross opposite the name of such party, and shall then be deemed to have voted for all its nominees, is unconstitutional in so far as it permits the names of political parties to be so printed and their candidates to be so voted for, because it is an attempt to discriminate against classes of voters not belonging to any of such parties, by subjecting them to the alternative of disfranchisement, or of casting their votes upon more burdensome conditions than are imposed upon others no better entitled to the free and untrammelled exercise of the right of suffrage. *Baton v. Brown*, 225.
2. **AUSTRALIAN BALLOT LAW — IRREGULARITY IN BALLOTS, WHEN WAIVED.** — When, under election laws, public officers are intrusted with the preparation and form of ballots to be used, and ample provision is made for the correction of errors therein, either by a candidate or other elector before the election is held, any objection to irregularities in the form of the ballot, or to the presence thereon of a name not entitled to

- be there, must be regarded as waived by a candidate, after the election has been held and such ballots have been voted. *Allen v. Glynn*, 304.
3. **AUSTRALIAN BALLOT LAW — BALLOTS WITH CROSS AT HEAD, NOW COUNTED — ERRONEOUS PLACING OF CANDIDATE.** — When, under the Australian system of voting, the name of an opposing candidate is erroneously placed upon a ballot prepared by public officers, all such ballots cast with a cross at the head thereof will be counted for such candidate, and it will not be presumed that the elector casting such ballot does not wish nor intend to vote for any candidate for that particular office. *Allen v. Glynn*, 304.
 4. **METHOD OF VOTING UNDER "AUSTRALIAN" SYSTEM.** — Under the "Australian ballot system," an elector desiring to vote an entire ticket need only put a cross at the head of the ballot; but if there is a single candidate on the ticket whom he does not wish to vote for, he must omit the cross at the top, and place it opposite the name of every candidate voted for, in order that his ballot may not be counted for the candidate falling under his displeasure. *Allen v. Glynn*, 304.
 5. **ERRORS OF PUBLIC OFFICERS IN PRINTING BALLOTS WILL NOT INVALIDATE.** — When the election laws provide severe penalties against public officers for violations thereof, a failure of such officers to publish the names of candidates as required, or error in printing their names under the wrong party title, will not necessarily invalidate the ballots so printed and voted at an election. *Allen v. Glynn*, 304.
 6. **ERRORS OF PUBLIC OFFICERS WILL NOT INVALIDATE.** — While election laws are mandatory in the sense that they impose a duty upon those who come within their terms, yet, when public officers are intrusted with the preparation of the ballots voted, the election will not be invalidated because of every departure on the part of such officers from the terms of such laws. *Allen v. Glynn*, 304.
 7. **ELECTION CONTEST — RIGHT TO HOLD OVER.** — On the trial of an election contest, pure and simple, the right of the contestor to hold over under an appointment to the office in dispute will not be considered. *Allen v. Glynn*, 304.
- See CONSTITUTIONS, 4-6; REWARDS, 1, 2; STATES, 1; STATUTES, 18-20.

ELECTRICITY.

See RAILROADS, 29, 30; TELEPHONES, 1.

EMBEZZLEMENT.

1. **A SERVANT RECEIVES MONEY FROM THE SALE OF GOODS OF HIS MASTER** and drops it into a money-drawer of a cash register, having an intent to appropriate it, and slips it into the drawer for his own convenience in keeping it for himself, his subsequently taking it from the drawer and appropriating it to his own use is not larceny, but embezzlement; nor is the fact that the money had been furnished by the master to a detective for the purpose of making the purchase, and thereby fastening the crime on the servant, make his offense any less an embezzlement. *Commonwealth v. Ryan*, 560.

EMINENT DOMAIN.

1. **HIGHWAYS — PRIVATE PROPERTY CANNOT BE TAKEN FOR PRIVATE ROAD.** — A constitutional provision authorizing the taking of private property for

public use prohibits, by implication, the taking of private property for any private use whatever without the consent of the owner. The establishment of a highway over the land of one person for the mere convenience of an adjoining owner is, therefore, prohibited by implication by such constitutional provision. *Richards v. Wolf*, 501.

2. **LAND OWNED BY RAILROAD OR GAS COMPANY MAY BE TAKEN FOR WHARF PURPOSES UNDER NEW YORK CONSOLIDATION ACT.** — Although property devoted to one public use will not be regarded as subject to the right of condemnation for another public use, unless the statute plainly grants such right, it is not necessary that the statute should, in terms, so enact, but it is sufficient if the right is conferred by necessary implication from the language used. The New York consolidation act contains a sufficient grant of power to include in condemnation proceedings property of the nature therein described, even when owned by a railroad or gas company, and used by it for landing freight or other property; and it is not necessary, in such proceedings, to show that the property to be taken is needed for the purpose of building any particular pier, dock, or bulkhead, if it be required to carry out the general plan. *In re Mayor of New York etc.*, 825.
3. **DAMAGES. — DISTINCT TRACTS OF LAND** connected only by means of a way, either private or public, cannot be treated as one for the assessment of damages inflicted under the exercise of the right of eminent domain. *Pennsylvania Co. v. Pennsylvania etc. R. R. Co.*, 762.
4. **DAMAGES — ABUTTING PROPERTY.** — A parcel of land some distance removed from a street, and connected with property abutting thereon only by means of a private way, cannot be treated as abutting property for the purpose of claiming damages inflicted by the exercise of the right of eminent domain. *Pennsylvania Co. v. Pennsylvania etc. R. R. Co.*, 762.
5. **DAMAGES — ABUTTING OWNERS.** — Property must be actually invaded, or it must abut upon a highway that is invaded in the exercise of the right of eminent domain, to entitle the owner thereof to recover damages. *Pennsylvania Co. v. Pennsylvania etc. R. R. Co.*, 762.

See CORPORATIONS, 1; RAILROADS, 1, 2; WATERS, 13; WHARVES.

ENTIRETY.

See HUSBAND AND WIFE, 2; MECHANIC'S LIEN, 5.

EQUITY.

1. **PRACTION IN CHANCERY.** — THE RELIEF WHICH MAY BE GRANTED in a suit in chancery must be restricted to the issues formed by the pleadings. Hence if the suit is to restrain the prosecution, by defendant, of actions of ejectment or for specific performance, and if that is refused, for the allowance of the value of complainant's improvements on the property, the court cannot, in the absence of affirmative pleadings on behalf of the defendant, decree, after the cause has been submitted for decision, that the defendant be allowed to file a cross-bill, and upon the filing of such cross-bill on the same day, enter a decree against complainant for the possession of the property, and for a sum specified for the use, enjoyment, rents, and profits thereof. *Metcalf v. Hart*, 122.
2. **JURY IN EQUITY CASES — INSTRUCTIONS.** — In cases of equitable cognizance, triable with or without a jury, the court may call a jury to try such specific questions of fact as may be presented to it, reserving to itself the power to make its own findings upon consideration of the evi-

dence and the verdict of the jury, and in such cases the court may refuse to give the jury any instructions. *Saint v. Guerrero*, 82.

2. **LICENSES — PROTECTION OF, IN EQUITY.** — When, by authority of a parol license, the licensee has been put in possession and induced to place valuable improvements on the land, of which he would be defrauded and robbed by the revocation of the license, equity will interpose, and either forbid the licensor to revoke the license, or impose such terms as will avoid fraud and accomplish what justice and good conscience demand. *McCauley v. Hart*, 122.

- See **CORPORATIONS**, 6; **FRAUDULENT CONVEYANCES**, 2; **HUSBAND AND WIFE**, 5; **INJUNCTIONS**; **JUSTICES OF THE PEACE**; **MORTGAGES**, 5, 11; **PARTIES**, 1; **PARTITION**, 2; **TRIAL**, 3, 6; **TRUSTS**, 6.

ERROR.

See **APPEAL**, 3; **TRIAL**, 12.

ESTATES.

- LIFE ESTATE CANNOT BE ENLARGED INTO FEE BY WARRANTY CLAUSE IN DEED.** — Where a deed, owing to the absence of words of inheritance in the conveying part, creates only a life estate in the grantee, such estate cannot be enlarged into a fee by the use of the word "heirs" in the warranty clause. *Jordan v. Neese*, 869.

See **DEEDS**, 1; **PARTITION**, 1.

ESTOPPEL.

- ACTUAL OWNERS OF LAND NOT ESTOPPED FROM ASSERTING THEIR RIGHTS WHEN.** — Although a declaration of trust made and recorded by the members of a syndicate formed for the purchase of lands declares that a certain interest in such lands belongs to a party who has made false representations to them, yet where such declaration was made in ignorance, which was not chargeable to neglect, and the person to whom the party who made the false representations mortgaged the lands had no knowledge of the execution of the declaration, the actual owners of the lands are not estopped from asserting their rights thereto. *Shoups v. Griffiths*, 910.

- See **BANKS**, 4; **HUSBAND AND WIFE**, 5; **INSURANCE**, 4; **JUDGMENTS**, 10, 11.

EVIDENCE.

1. **WILLS — EVIDENCE OF TESTATOR'S INTENT.** — Parol evidence is admissible to give effect to an intention expressed in a will, but such evidence is never admissible for the purpose of showing a testator's intention by proof of his oral declarations of intent, either as to the persons who shall take his estate, or as to what particular part of his estate any one person was intended to receive. *Heilenheimer v. Bauman*, 29.
2. **CONSIDERATION OF A DEED** may be proved by parol to be wholly different from that expressed therein. *Moffatt v. Bulson*, 192.
3. **LETTERS FORMING PART OF SAME CORRESPONDENCE, ADMISSIBLE IN EVIDENCE WHEN.** — When, in action on an insurance policy, the defendant has introduced in evidence its letters to the plaintiff in relation to the loss in question, the plaintiff has the right to put in evidence letters written by him to the defendant, which form a part of the same correspondence, although they contain declarations prejudicial to the defendant. *Graves v. Merchants' etc. Ins. Co.*, 507.

4. VARIANCE—CONTRACT INVOLVING DIFFERENT RESPONSIBILITIES NOT ADMISSIBLE IN EVIDENCE WHEN.—Where the contract set out in a complaint is a contract to ship, transport, and carry the plaintiff's goods to a certain point, a bill of lading containing a contract to merely forward them to that point, and stipulations that the defendant would not assume any liability beyond its own rails, and would not be responsible for delays or damages from unavoidable causes, is not admissible in evidence, since these are distinct and different contracts, involving different responsibilities. *Dunbar v. Port Royal etc. Ry Co.*, 860.

See APPEAL, 5, 7; ATTORNEY AND CLIENT, 4-6; CONTRACTS, 1; CRIMINAL LAW, 3, 6; DEEDS, 12; INFANTS; INSURANCE, 2; MALICIOUS PROSECUTION, 1; MASTER AND SERVANT, 12, 13; MORTGAGES, 1-3; NEGOTIABLE INSTRUMENTS, 3-5; PLEADING, 6; SALES, 3; STATUTES, 12; TAXES, 7, 8; TRIAL, 2, 7; TRUSTS, 3; WILLS, 1; WITNESSES.

EXCUSABLE NEGLECT.

See JUDGMENTS, 22, 23.

EXECUTION.

1. EXECUTION NOT SIGNED, INSUFFICIENT TO AUTHORIZE REDEMPTION.—

When the only execution recited in a transcript from the docket of a justice of the peace filed in the office of the clerk of the circuit court is a paper, unsigned by the justice, in the form and phraseology of an execution, the transcript, as filed, will create no lien, and will not authorize the circuit court to issue an execution under which redemption can be made from a foreclosure sale. *Wooters v. Joseph*, 355.

NECESSARY REQUISITES OF SIGNING.—A paper containing the form and peculiar phraseology of an execution issued by a justice of the peace, but which is not signed by him, is not a valid execution, and confers no authority upon an officer to make a levy. His return upon it can have no more effect than his indorsement upon any other extrajudicial paper. *Wooters v. Joseph*, 355.

2. JUSTICE'S TRANSCRIPT—WHEN CREATES LIEN ON LAND.—In order that a transcript of a justice's docket filed in the circuit court may create a lien on land, and authorize the issuance of an execution by the clerk of that court, it must recite that execution issued under the justice's judgment, and must show a return thereof, to the effect that the defendant has not sufficient personal property within the county to satisfy such judgment and costs. *Wooters v. Joseph*, 355.

4. JUSTICE'S TRANSCRIPT AS LIEN ON LAND—UPON WHAT DEPENDS.—Whether or not a lien is created against the land of a defendant by filing a transcript of a justice's judgment and proceedings in the circuit court, and whether or not authority is thus conferred upon the clerk of that court to issue an execution, depends, not upon the existing facts, but upon whether or not such transcript recites the requisite statutory facts. *Wooters v. Joseph*, 355.

5. JUDGMENTS—EXECUTION UPON AFFIRMANCE OF JUDGMENT.—When a judgment has been affirmed on appeal, and the cause remanded to the court of original jurisdiction, the general rule is, that the prevailing party is entitled to have execution issue upon such judgment from the court thus reinvested with the custody of the record. *Rockwell v. District Court*, 265.

ATTORNEY AND CLIENT, 2; GUARANTY, 1; HOMESTEAD, 2; HUSBAND AND WIFE, 5; JUDGMENTS, 8, 10-14, 18; MUNICIPAL CORPORATIONS, 18, 19; PROCESS, 2.

EXECUTORS AND ADMINISTRATORS.

1. **WILLS — POWERS UNDER — MORTGAGE.** — When a devisee for life is made executrix with power to sell the real estate, a mortgage executed by such devisee will bind the remaindermen. *McCreary v. Bomberger*, 760.
2. **CONFLICT OF LAWS. — AN ADMINISTRATOR APPOINTED IN THE STATE IN WHICH THE DECEDENT HAD HIS DOMICILE** succeeds to all rights of action arising out of the statutes of another state. *Higgins v. Central New England etc. R. R. Co.*, 544.
3. **DECEASED PERSONS — CONTINGENT CLAIMS.** — A suit by a creditor of an insolvent corporation to compel payment for *bonus* stock issued to a decedent is based upon a contingent claim within the meaning of a statute permitting claims to be prosecuted against a decedent after the expiration of the usual time for their presentation, when such claims are contingent. *Hoopes v. Northwestern Mfg. Co.*, 637.

See NEGLIGENCE, 2; SPECIFIC PERFORMANCE, 2.

EXEMPTION.

See JUDGMENTS, 6; MUNICIPAL CORPORATIONS, 18, 19; TAXES, 2, 6.

EXPERTS.

See WITNESSES, 2, 3.

EX POST FACTO.

See CRIMINAL LAW, 3, 4.

EXTRADITION.

1. **OBIGATION OF STATES OF UNION TO EXTRADITE NOT FOUNDED ON COMITY OR TREATY, BUT ON FEDERAL CONSTITUTION.** — The obligation of the states of the Union to surrender to each other persons charged with crime is not founded upon comity or treaty, but upon the provisions of the federal constitution, and is not limited to specific offenses, but embraces all crimes. The constitution contains no express condition that the state to which a fugitive is surrendered cannot try him for any other offense than that charged in the warrant of extradition, and no such condition can be implied. Where, therefore, in *habeas corpus* proceedings, it appears that the relator has been extradited from the state of Wisconsin upon a requisition of the governor of this state, stating that the relator stood charged with grand larceny, and that after his return to this state the indictment for grand larceny was quashed, and he was held upon an indictment for robbery in the first degree, both indictments being based upon the same acts, no principle of comity between the states, nor any legal right secured to the relator, is violated by his detention. *People v. Cross*, 850.
2. **EXTRADITED FUGITIVE TRIABLE FOR CRIME OTHER THAN THAT NAMED IN WARRANT WHEN.** — A fugitive from justice, surrendered to the authorities of this state upon their demand, pursuant to the constitution and laws of the United States, by the governor of another state, may be held and tried here for a crime other than that charged in the warrant by

virtue of which he was arrested and surrendered in the state to which he had fled, when the criminal act for which he was extradited and that for which he is indicted and held is the same. *People v. Cross*, 322.

FALSE IMPRISONMENT.

1. **ARREST WITHOUT PROBABLE CAUSE.** — When a person is the procuring and directing cause of the arrest and imprisonment of another, by pointing him out and beckoning him to come to an officer, without knowing or inquiring his name or residence, and acting solely on suspicion that he answers a description received by telegram of a person accused of larceny, the arrest is made without probable cause, and the person thus causing it to be made, if mistaken in the identity of the person arrested, is liable in damages for his false imprisonment, although the arrest was caused without malice. *Mallinani v. Gronlund*, 576.
2. **JUSTIFICATION FOR ARREST.** — A private person has a right to arrest, on suspicion of felony, without a warrant; but if he does so, and it transpires that the wrong man is imprisoned, he must be prepared to prove, in justification, that a felony had been committed, and that the circumstances under which he acted were such that any reasonable person, acting without passion or prejudice, would have fairly suspected that the person arrested committed or was implicated in the crime. *Mallinani v. Gronlund*, 576.

FALSE REPRESENTATIONS.

See DAMAGES, 1; ESTOPPEL.

FEDERAL GOVERNMENT.

See JURISDICTION.

FEEES.

See CONTEMPT, 23; STATUTES, 10.

FIFTEENTH AMENDMENT.

See CONSTITUTIONS, 2, 6.

FINDINGS.

See EQUITY, 2.

FINES.

See CONSTITUTIONS, 2.

FIXTURES.

AS BETWEEN A MORTGAGOR AND MORTGAGEE. — A counter and back bar, the one fastened to the floor and the other to the wall by nails and screws, in a building used as a saloon, are part of the realty, and pass as such on the foreclosure of a mortgage. *Woodham v. First Nat. Bank*, 622.

FORECLOSURE.

See EXECUTION, 1; FIXTURES; REAL PROPERTY, 1; TRUSTS, 6.

FOREMAN.

See MASTER AND SERVANT, 3-8; RAILROADS, 22-25.

FORFEITURE.

See ASSOCIATIONS; INSURANCE, 7-9.

FOURTEENTH AMENDMENT.

See CONSTITUTIONS, 5, 6; STATUTES, 16.

FRANCHISES.

See RAILROADS, 28; RECEIVERS, 1; TELEPHONES, 2, 3.

FRAUD.

1. FRAUD IS UNFAIR DEALING, and when, through inducements held out by one person, another is influenced to change his position so that he cannot be placed *in statu quo*, and will be seriously damaged unless the promise is fulfilled, then the refusal to perform is fraud. *Metcalf v. Hart*, 122.
2. ORDINARILY, PROMISES TO PERFORM ACTS IN THE FUTURE, although made by one party as a representation to induce the other to enter into the contract, will not amount to legal fraud, though the promises are subsequently entirely broken and unfulfilled without excuse. *Chicago etc. Ry Co. v. Titterington*, 39.
3. PROMISES, WHEN AMOUNT TO, AND WHEN QUESTION FOR JURY. — When a railway company, at the time of receiving an absolute conveyance of a right of way, promises to locate and maintain a depot on the land granted as part of the consideration for the deed, but with no intention, at the time, of performing the promises, using them merely as false pretenses to induce the grantor to execute the deed, and if its conduct did have that effect, such promises, coupled with an utter failure and refusal to perform them, is such actual fraud as will authorize the grantor to have the contract rescinded, and the land restored to him. But if such promises were made in good faith at the time of the contract, and the grantee subsequently changed its intention, and failed or refused to perform them, then such conduct by the company will not constitute such legal fraud as will justify the rescission of the contract or the cancellation of the deed. In such case the question as to whether the intent to defraud and deceive, at the time of making the contract, existed or not is a question of fact for the jury. *Chicago etc. Ry Co. v. Titterington*, 39.

See CORPORATIONS, 8; EQUITY, 3; INJUNCTIONS, 1; LIMITATIONS OF ACTIONS, 2; TRUSTS, 1; WILLS, 6.

FRAUDULENT CONVEYANCES.

1. A SUBSEQUENT CREDITOR CANNOT avoid a conveyance by his debtor, not intended to nor operating to defraud him, on the ground that it was executed to defraud existing creditors. *Fullington v. Northwestern Importers' etc. Ass'n*, 663.
2. RIGHTS AS BETWEEN PARTIES. — A conveyance of property in fraud of creditors of the grantor is binding as between the parties to it; and neither courts of law nor of equity will aid a fraudulent grantor in recovering the property, or in enforcing the trust upon which the conveyance was made. *Springfield Homestead Ass'n v. Roll*, 353.
3. EFFECT OF RECONVEYANCE AS BETWEEN THE PARTIES. — While a fraudulent grantee is under no legal but only a moral obligation to reconvey

to his grantor, yet when he makes a reconveyance, such act will be binding on him, and if the rights of no innocent third party have intervened, the fraudulent grantor will become reinvested, both in law and in equity, with the title previously conveyed to his grantee. *Springfield Homestead Ass'n v. Roll*, 358.

4. **UNRECORDED RECONVEYANCE — EFFECT OF, ON MORTGAGE OF FRAUDULENT GRANTEE.** — When a grantor, under a recorded conveyance of his land, made in fraud of creditors, remains in open and notorious possession, and receives a reconveyance from his fraudulent grantee, which, being unrecorded, is afterwards lost or stolen, a subsequent mortgage of the fraudulent grantee will be deemed to have had notice of the title of the fraudulent grantor arising from his possession under his unrecorded reconveyance, and the mortgage will be considered void as against him, and set aside as a cloud on his title. *Springfield Homestead Ass'n v. Roll*, 358.

See CORPORATIONS, 6, 7; CREDITOR'S SUIT; DEEDS, 6; HUSBAND AND WIFE, 4; JUDGMENTS, 8.

FUGITIVES.

See EXTRADITION.

GAS.

See NATURAL GAS.

GAS COMPANIES.

See EMINENT DOMAIN, 2.

GIFTS.

See DEEDS, 6.

GOVERNOR.

See EXTRADITION, 1; MANDAMUS, 3-6.

GRAND JURY.

See CRIMINAL LAW, 1; STATUTES, 13.

GUARANTY.

1. **ONE WHO GUARANTEES THE COLLECTION OF A PROMISSORY NOTE** agrees to pay the debt in case it cannot be collected out of the principal debtor by the exercise of due and reasonable diligence, and this is usually a resort to the ordinary course of the law, consisting of obtaining judgment, issuing execution, and having it returned unsatisfied. *Dewey v. W. B. Clark Invest. Co.*, 623.
2. **GUARANTY OF COLLECTION OF NOTES SECURED BY MORTGAGE.** — If the holder of a note secured by a mortgage sells it, guaranteeing its collection, and at the same time assigning the mortgage to the purchaser, the latter cannot maintain an action upon the guaranty until he has resorted to the mortgage, where it is conceded to be adequate security for the debt. *Dewey v. W. B. Clark Invest. Co.*, 623.

See CORPORATIONS, 16; SURETYSHIP, 1, 2.

GUARDIAN AND WARD.

1. JURISDICTION OF NON-RESIDENT MINORS. — The power of the courts of the state to appoint a guardian for non-resident minors having property within its jurisdiction is unquestionable. *Kurtz v. St. Paul etc. R. R. Co.*, 657.
 2. GUARDIAN'S SALE CANNOT BE COLLATERALLY ATTACKED in an action between third persons on the ground that the purchaser was the attorney of the guardian. *Kurtz v. St. Paul etc. R. R. Co.*, 657.
- See MECHANIC'S LIEN, 3; NOTICE, 2, 3; SPECIFIC PERFORMANCE, 3; WILLS, 7-9.

HABEAS CORPUS.

- UNCONSTITUTIONALITY OF STATUTE. — If a prisoner claims that the statute under which he was convicted was unconstitutional, and therefore void, that question may be considered and determined upon *habeas corpus*. *In re Wright*, 94.

See EXTRADITION, 1.

HEIRS.

See TRUSTS, 2.

HEREDITAMENTS.

See EJECTMENT, 1.

HIGHWAYS.

- A COURT CANNOT DIRECT HOW AND WHEN DRAINS shall be constructed by highway officers. *Patoka Township v. Hopkins*, 417.
- See EMINENT DOMAIN, 1, 5; RAILROADS, 19, 20; WATERS, 2.

HOMESTEAD.

1. JUDGMENT. — When a person not under disability is sued, and the homestead is involved, it will be affected by any neglect to assert it, precisely the same as any other right. *Graham v. Oulrer*, 105.
 2. PROPERTY OF MARRIED WOMAN, WHEN NOT EXEMPT. — When a married woman owns an undivided interest in land on which are two houses in a condition for occupancy, and rented at the time when the property is seized under execution issued on a judgment against her and her husband, and while they are residing elsewhere, she cannot, in an action to set aside the levy, change the character of the property to a homestead, and claim it as exempt, by saying that she intends, at some future time, to occupy it as a home. *Evans v. Cohnen*, 606.
- See ACKNOWLEDGMENTS; JUDGMENTS, 8; PUBLIC LANDS, 2.

HUSBAND AND WIFE.

1. WIFE CANNOT BECOME PARTNER IN BUSINESS WITH HER HUSBAND. — A married woman cannot make a contract of partnership with her husband. *Board of Trade v. Hayden*, 919.
 2. HUSBAND'S DEBT. — A mortgage and note executed by a husband and wife to secure the payment of a loan made to him cannot be enforced against her under the statutes of Indiana, when the property embraced in the mortgage is held by them as tenants by the entirety. *Wilson v. Logue*, 426.
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3. **HOMESTEAD, CONVEYANCE OF, BY HUSBAND ALONE.** — The husband alone may convey a part of a community homestead to a railway company for a right of way, provided such conveyance does not operate to interfere with the enjoyment of the homestead by the wife. *Chicago etc. R. R. Co. v. Titterington*, 39.
4. **CONVEYANCE BY HUSBAND TO WIFE VALID AS AGAINST SUBSEQUENT CREDITOR WHEN.** — When a husband pays his wife one hundred dollars a year for services rendered by her, and in consideration of the loan by her to him of the sum so paid, and of other property given to her by her relatives, makes to her a conveyance of property, such conveyance will be valid as against a subsequent creditor. *Daggett etc. Co. v. Bulfer*, 464.
5. **JUDGMENT AGAINST MARRIED WOMAN — ESTOPPEL.** — When a married woman, after personal service of summons, allows judgment to be taken against her by default upon a note signed by herself and husband, she is thereafter estopped from maintaining a suit in equity to set aside a levy under execution issued on such judgment, on the ground that the judgment is void as to her, because the consideration for the note was not for her individual benefit or for the benefit of her estate. *Beane v. Calman*, 608.
- See DEEDS, 6; DOWER; INSURANCE, 8; JUDGMENTS, 8; MECHANIC'S LIEN, 4, 5.

IOE.

See MUNICIPAL CORPORATIONS, 8, 9; SALES, 1, 2.

IMPRISONMENT.

See FALSE IMPRISONMENT.

IMPROVEMENTS.

See EQUITY, 3; LICKNER, 2, 3, 9; MORTGAGES, 8; SPECIFIC PERFORMANCE, 2.

INDICTMENT.

See CRIMINAL LAW, 1, 2; EXTRADITION; LARCENY, 1; STATUTES, 12.

INDORSEMENT.

See EXECUTION, 2.

INFANTS.

A NEXT FRIEND CANNOT COMPROMISE and discharge an action by agreement made in good faith out of court, where no judgment is entered in pursuance of such agreement, and it is never approved by the court. If, however, judgment should be entered in accordance with the agreement, it would no doubt bind the infant. In the absence of such judgment or approval, the agreement is not admissible in bar of the action, nor in mitigation of damages. *Tripp v. Gifford*, 530.

See GUARDIAN AND WARD, 1; MASTER AND SERVANT, 2, 12-18; MECHANIC'S LIEN, 3; WITNESSES, 1.

INFORMATION.

See CRIMINAL LAW, 2; LARCENY, 1; STATUTES, 12.

INFRINGEMENTMENT.

See INJUNCTIONS, 1.

INJUNCTIONS.

1. **INJUNCTION AGAINST JUDGMENT.** — A court of equity will grant an injunction to restrain a manufacturer and patentee from using a judgment fraudulently and collusively obtained as the result of a conspiracy to injure the complainant, who is engaged in a similar manufacturing business, and from claiming that such decree is an adjudication upon the merits as to the validity of such patent, or from using it in any way to influence or threaten any person against purchasing the goods manufactured and sold by the complainant, who is in possession of facts and proofs sufficient to defeat any suit that might be brought for the infringement of such patent. *Grand Rapids etc. Furniture Co. v. Hancy etc. Furniture Co.*, 611.
2. **NATURAL GAS — ENJOINING USE OF DANGEROUS EXPLOSIVES.** — One who sinks a gas-well in a thickly populated part of a city will be enjoined from collecting dangerous explosives with which to "shoot" it, if his so doing will endanger the lives or property of persons having no connection with his operations. *People's Gas Co. v. Tyner*, 433.
3. **INJUNCTION AGAINST CRIMINAL ACT.** — The fact that an act complained of has been made criminal by statute does not deprive a court of equity of the power to enjoin its commission or continuance. *People's Gas Co. v. Tyner*, 433.
4. **MOTION FOR EXTRA ALLOWANCE OF COSTS, DUTY OF COURT TO DISPOSE OF.** — Where, in an action for an injunction, the defendant makes a motion for an extra allowance of costs, if the right sought to be enjoined has a money value, and there is any evidence to establish such value, the court has jurisdiction to entertain the motion, and it is its duty to exercise its discretion, and dispose of the motion upon its merits. *Hudson River Telephone Co. v. Watervliet Turnpikes etc. Co.*, 838.
5. **INJUNCTION DISSOLVED WITHOUT ANSWER, WHEN.** — When the issues raised on a motion to dissolve an injunction are all issues of law, and not of fact, the injunction may be dissolved, although the facts alleged in the petition have not been denied by answer. *Burlington etc. Ry Co. v. Dey*, 477.
6. **DISSOLUTION OF INJUNCTION NOT IN DISCRETION OF COURT, WHEN.** — Where the dissolution of an injunction involves the determination of questions of law arising upon the face of the petition, the supreme court will not defer to the discretion of the trial court in refusing to dissolve the injunction. If it appears upon the face of the pleadings that, as a matter of law, the injunction ought not to have been granted, it will dissolve it. *Burlington etc. Ry Co. v. Dey*, 477.

See EQUITY, 1; TELEPHONES, 3; WATERS, 2.

IN PERSONAM.

See JUDGMENTS, 2.

IN REM.

See JUDGMENTS, 2.

INSANE PERSONS.

See WILLS, 7-9.

INSOLVENCY.

See CORPORATIONS, 10, 11, 16; EXECUTORS AND ADMINISTRATORS, 2; LIMITATIONS OF ACTIONS, 1.

IN STATU QUO.

See FRAUD, 1.

INSTRUCTIONS.

See APPEAL, 5, 6; EQUITY, 2; TRIAL, 7-11.

INSURANCE.

1. **VARIANCE BETWEEN APPLICATION AND POLICY — PRESUMPTION.** — When a life tenant states his interest to be "a life lease," in his application for fire insurance, and the insurance agent issues a policy on the full value of the fee, the company cannot, after loss, set up the mistake of its agent as a defense. The presumption exists that the policy represents the precise and definite contract between the parties, and the burden of proof is upon the one who seeks to change its terms by parol. *Welsh v. London Assur. Corp.*, 786.
2. **NOTICE OF LOSS.** — Proof that the adjuster of an insurance company was sent to the place of the fire under instructions from his company, and that he was there one week after the fire, is conclusive evidence of notice to the company of the loss. *Welsh v. London Assur. Corp.*, 786.
3. **FURTHER PROOF OF LOSS MAY BE WAIVED BY AGENT OF COMPANY WHEN.** — Where, immediately after the loss of property insured, the insurance company is notified of the loss, and within thirty days from the date of the loss sends its adjuster to investigate the loss, who takes a sworn statement from the insured as to how the fire originated, and as to the amount and value of the property destroyed, and declares his satisfaction with the proofs thus made, the power given to the adjuster to investigate the loss includes the power to take proofs of the loss, and although such proofs may be less complete than the policy called for, the adjuster may be deemed to have had authority to waive any further proofs. *Graves v. Merchants' etc. Ins. Co.*, 507.
4. **PROOF OF LOSS — WAIVER — ESTOPPEL.** — When the insured, in good faith and within the stipulated time, does what he plainly intends as compliance with the requirements of his policy as to proofs of loss, good faith equally requires that the company shall notify him promptly of any objections thereto, so as to give him an opportunity to obviate them, and mere silence may so mislead him, to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel. *Welsh v. London Assur. Corp.*, 786.
5. **INSURANCE BY LIFE TENANT — MEASURE OF DAMAGES.** — When a tenant for life, intending to insure the property for the benefit of himself and the remaindermen, receives a policy for the full value of the fee, by mistake of the insurer, who accepts the full premium, the insured may recover the full value of the policy after loss, as trustee for the remaindermen. *Welsh v. London Assur. Corp.*, 786.
6. **CHANGE IN TITLE UNDER CONDITIONAL SALE — ASSIGNMENT OF POLICY.** — A change in the possession of insured property without the consent of the insurer, under a contract purporting to be a lease, but in effect a conditional sale, with notice to the insurer of the change of possession, and that the property had been leased, but not of the terms

of the contract, prior to his consent to an assignment of the policy, providing that any change in the title, interest, or possession of the insured property, whether by sale, transfer, or conveyance, in whole or in part, should render it void, is such a change in the title to the property as will render the policy void in the hands of such assignee with notice of the terms of the contract of conditional sale. *Fire Ass'n v. Flournoy*, 89.

7. **ASSIGNMENT OF POLICY — NEW CONTRACT.** — The consent of the insurer to an assignment of a policy creates a new contract on his part, when there has been a prior forfeiture, only when the assignee is ignorant of such forfeiture, or of the facts from which it resulted. *Fire Ass'n v. Flournoy*, 89.
8. **JOINDER OF PARTIES PLAINTIFF IN AN ACTION ON POLICY OF INSURANCE.** — A husband and wife are entitled to join as plaintiffs in an action upon a policy of insurance to recover for their respective losses, where the policy has been issued to them jointly for a specified amount, upon a building which is the separate property of the wife, and for not exceeding an amount named upon a stock of merchandise in said building, which merchandise is the separate property of the husband, in consideration of a single sum paid by them as premium, both properties having been destroyed by fire. *Graves v. Merchants' etc. Ins. Co.*, 507.
9. **CERTIFICATE NOT FORFEITED BY SUBSEQUENT CHANGE TO PROHIBITED EMPLOYMENT, WHEN.** — When a certificate in a mutual benefit society is issued to a member who was, at the time of its issuance, engaged in a lawful business not prohibited by the by-laws of the association, his subsequent change of occupation to one that is hazardous and prohibited by the by-laws of the association will not have the effect to render the certificate void, when the contract of insurance contains nothing in reference to a change of occupation by a member. *Hobbs v. Iowa Mut. Ben. Ass'n*, 466.
10. **BENEFIT SOCIETY, PROVISIONS OF CERTIFICATE OF, NOT EXTENDED TO POSTHUMOUS CHILD.** — When a widower who receives a benefit certificate in the Ancient Order of United Workmen, in which his three children are designated as beneficiaries, subsequently marries, and after his death a child of such marriage is born, the provisions of the contract represented by the certificate will not be extended beyond its terms so as to include such posthumous child. Such a certificate is not at variance with a by-law of the society, which provides that its object is "to afford financial aid and benefit to the widows, orphans, and heirs or devisees of deceased members." *Spry v. Williams*, 460.

See EVIDENCE, 3; TRIAL, 4; WITNESSES, 2.

INTEREST.

- INTEREST ALLOWABLE, IN DISCRETION OF JURY, UPON SUM LOST THROUGH DEFENDANT'S NEGLIGENCE.** — Where the value of property is diminished by an injury wrongfully inflicted, the jury may, in their discretion, give interest, by way of damages, on the amount by which the value is diminished, from the time of the injury. *Wilson v. Troy*, 817.

See DEBTOR AND CREDITOR, 2; TRUSTS, 11.

INTERMENT.

See EJECTMENT, 2.

INTERSTATE COMMERCE.

1. **SOLICITING ORDERS FOR DEALER IN ANOTHER STATE — LICENSE FEE.** — A city ordinance requiring an agent for a wholesale book house situated in another state to take out a license and pay a license fee when soliciting book orders within the city is void, as an attempt to regulate commerce between the states. The fact that the sales made are at retail instead of wholesale, and that the ordinance makes no discrimination between those soliciting orders for houses within the state and those soliciting orders for houses in other states, makes no difference. *Bloomington v. Bourland*, 382.
2. **SALES OF GOODS IN OTHER STATES.** — The negotiation of sales of goods which are in other states, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce, and cannot be interfered with or regulated by the state in which the negotiation is made. *Bloomington v. Bourland*, 382.
See TAXES, 2, 3, 5.

INTOXICATING LIQUORS.

See MUNICIPAL CORPORATIONS, 2.

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See MANDAMUS, 1; WATERS.

IRRIGATION COMPANIES.

See WATERS, 12, 14-19.

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JUDGMENTS.

1. **CONSTRUCTIVE SERVICE — COLLATERAL ATTACK.** — A judgment rendered by a court of competent jurisdiction upon citation by publication is not open to collateral attack on the ground that the affidavit for publication is insufficient. *Hardy v. Beaty*, 80.
2. **JUDGMENTS IN PERSONAM AGAINST NON-RESIDENTS BY CONSTRUCTIVE SERVICE.** — A judgment against non-residents *in personam* for costs, upon service by publication, in an action to try title to an undivided interest in land, is without jurisdiction, and a sale under it is void. *Hardy v. Beaty*, 80.
3. **JUDGMENTS IN REM AGAINST NON-RESIDENTS UPON CONSTRUCTIVE SERVICE.** — A judgment in an action to try title to an undivided interest in land upon service by publication upon non-resident defendants, is valid, so far as it affects the title to such land. *Hardy v. Beaty*, 80.
4. **JUDGMENTS UPON CONSTRUCTIVE SERVICE — PRESUMPTIONS IN FAVOR OF.** — Judgments rendered upon constructive service by publication are given the same conclusive effect and are entitled to the same favorable presumptions as judgments upon personal service. *Hardy v. Beaty*, 80.
5. **COLLATERAL ATTACK, WHAT IS.** — The court intimates that, were the question necessarily involved, it would hold that every attack upon a

judgment for want of jurisdiction in the court to render it, predicated on matters *dehors* the record, is a collateral attack. *Oully v. Shirk*, 414.

6. **PRESUMPTION UPON COLLATERAL ATTACK.** — In a collateral attack upon a domestic judgment of a court of general jurisdiction, every presumption will be indulged in favor of the jurisdiction of the court and the validity of the judgment; and when it does not otherwise appear, it will be presumed that the court ascertained all facts necessary to the exercise of its jurisdiction. In order for such attack to prevail, it must affirmatively appear that the facts essential to the jurisdiction of the court did not in fact exist. *Hardy v. Beatty*, 80.

7. **LIEN OF — REGISTRY OF ABSTRACT.** — When the number of a judgment is prescribed by law as a prerequisite to the record of an abstract of such judgment in order to create a lien, the number of the judgment cannot be dispensed with; and the registry of the abstract without giving such number does not create a lien. *Bonner v. Grisby*, 48.

8. **HOMESTEAD RIGHTS, WHEN CONCLUSIVE AGAINST.** — If a suit in chancery is brought against a husband and wife, in which plaintiffs allege themselves to be the owners of certain real property, and that they are unlawfully kept out of possession by defendants, and that certain deeds under which the wife claims title were made to hinder, delay, and defraud creditors of the husband, and plaintiffs pray that they may have possession of the property and be declared owners thereof, and that the deeds to the wife be adjudged fraudulent and void, and set aside, and judgment is rendered in favor of the plaintiffs for the relief sought, such judgment is conclusive against every claim of right to possession existing in favor of defendants, and precludes the wife from subsequently asserting any title or right of possession on the ground that the property was, before the commencement of the former action, and still is, a homestead, and that the title of the plaintiffs is based upon a sale of the property under execution against her husband when it was exempt from such sale. *Graham v. Culver*, 105.

9. **JUDGMENT IS CONCLUSIVE ONLY BETWEEN** the parties and their successors in interest by title subsequent to the commencement of the action. *Warnock v. Harton*, 209.

10. **RES JUDICATA — PARTY FAILING TO PRESENT DEFENSE ESTOPPED FROM DOING SO AFTERWARDS.** — Where a defendant had an opportunity to plead payment of the judgment when summoned to show cause why the execution should not be renewed, but failed to do so, the order of renewal is *res judicata*. *Sullivan v. Shell*, 894.

11. **ESTOPPEL.** — A judgment for the plaintiff sweeps away every defense that should have been raised against the action, and this for the purpose of every subsequent suit, whether founded upon the same or a different cause. Thus in a possessory action, the defendant is under obligation to plead all the titles under which he claims, and if he fails to do so, and judgment is entered against him, he cannot, in a subsequent action, set up title of which he might have availed himself in the first. *Graham v. Culver*, 105.

12. **WHEN RES JUDICATA.** — The doctrine of *res judicata* is applicable only to those judgments, decrees, or orders of record which are so far material and final that a review thereof may be had through the ordinary procedure, such as appeals or writs of error. The granting or refusing of other applications or motions does not necessarily prevent a subsequent renewal thereof upon the same or different grounds, when

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- jurisdiction over the subject-matter remains in the same tribunal. *Rockwell v. District Court*, 265.
13. ORDER QUASHING EXECUTION NOT RES JUDICATA. — No appeal or writ of error lies from an order of the district court quashing an execution, and the doctrine of *res judicata* does not apply thereto. *Rockwell v. District Court*, 265.
 14. JUDGMENT ON APPEAL BOND — MERGER OF ORIGINAL JUDGMENT — ISSUE OF EXECUTION. — When a judgment appealed from has been affirmed, and an action on the appeal bond has been prosecuted to judgment, and such judgment is pending on appeal, the original judgment is not merged in or extinguished by the judgment on the appeal bond, so as to prevent the issuance of execution on the former. *Rockwell v. District Court*, 265.
 15. MERGER. — JUDGMENT UPON AN APPEAL BOND does not extinguish the judgment appealed from. *Rockwell v. District Court*, 265.
 16. JUDGMENT ON DECREE OUTSIDE OF THE ISSUES is to that extent without jurisdiction and void. *Metcalf v. Hart*, 122.
 17. JUDGMENT OF ABOLISHED COURT IS VOID. — A sentence imposed or judgment rendered by a court after it has been abolished by statute is void. *Gorman v. People*, 350.
 18. PROPER MODE OF PROCEEDING TO VACATE. — Where execution is renewed under proper proceedings after the judgment has been satisfied, if the defendant has any remedy, he must seek it by motion in the original cause, and not by a new and independent action. *Sullivan v. Shell*, 894.
 19. MOTION TO VACATE. — COUNTER-AFFIDAVITS will not be received to rebut the allegation of merits contained in affidavits presented by a party moving for relief from a judgment by default. *Douglass v. Todd*, 247.
 20. ARREST OF JUDGMENT, MOTION IN, WHEN ONLY AVAILABLE. — A motion in arrest of judgment is available only when the facts stated in the petition do not entitle the plaintiff to any relief whatever. *Johnson v. Miller*, 514.
 21. RELIEF FROM JUDGMENT, ON THE GROUND THAT THE SHERIFF'S RETURN OF SERVICE OF PROCESS IS FALSE, will not be granted in an action to set aside such judgment, when there is no pretense that the conduct of the officer or of the sheriff was fraudulent. *Cully v. Shirk*, 414.
 22. RELIEF AGAINST, FOR MISTAKE OF LAW. — If a defendant fails to make his defense to an action because, after consulting with an attorney, he is advised by such attorney that his defense is not good in law, and believes and relies upon the advice so given, he may, on motion, be relieved from a judgment subsequently entered against him by default, if the attorney was mistaken, and the defense was good in law, and would have been interposed but for the advice received. A statute authorizing relief to be granted upon motion from a judgment entered against a party through his mistake, inadvertence, or excusable neglect is not restricted to mistakes of fact, but authorizes relief to be granted on account of a mistake of law. *Douglass v. Todd*, 247.
 23. RELIEF AGAINST JUDGMENT ON GROUND OF EXCUSABLE NEGLIGENCE. — Where a defendant duly served with summons, under no mistake as to the necessity of employing counsel, intrusts the copy summons to a friend, directing him to hand it to an attorney, with instructions to appear and plead payment, but it is not delivered to the attorney until after the time for answering had passed, and judgment by default was taken a year after, there is no such mistake, inadvertence, surprise, or excusable

neglect as will entitle him to relief under section 195 of the code. *Sul-
Steen v. Shell*, 894.

See APPEAL, 1, 6, 8; ATTORNEY AND CLIENT, 2, 6; CONTEMPT, 1, 2; CON-
TRACTS, 1; CREDITOR'S SUIT; COURTS; EQUITY, 1; EXECUTION, 2-5;
GUARANTY, 1; HOMESTEAD, 2; HUSBAND AND WIFE, 5; INFANTES; IN-
JUNCTIONS, 1; JUSTICES OF THE PEACE; OFFICERS, 2; PROCESS; RE-
CEIVERS, 4; SURETYSHIP, 1, 6; TRESPASS TO TRY TITLE, 2; VENDOR
AND PURCHASER, 2, 4.

JUDICIAL NOTICE.

See EVIDENCE; RAILROADS, 15.

JURISDICTION.

**JURISDICTION OF STATE COURT OVER TRESPASS COMMITTED ON LAND CEDED
TO UNITED STATES.** — Where Congress has made no new regulations
touching the administration of justice in civil cases with respect to ac-
tions arising within territory which a state has ceded to the federal gov-
ernment for the purpose of a navy-yard, the laws of the state in force at
the time of the cession, and the jurisdiction of its courts in regard to
private rights and remedies, remain unchanged and unaffected by the
act of cession. *Barrett v. Palmer*, 835.

See GUARDIAN AND WARD, 1; INJUNCTIONS, 4; JUDGMENTS, 1, 2, 5, 6, 12, 16;
JUSTICE OF THE PEACE; PUBLIC LANDS, 1; RECEIVERS, 2; STATES, 2.

JURY AND JURORS.

See EQUITY, 2; INTEREST; TRIAL, 2, 5-7, 9, 12; WILLS, 2.

JUSTICE OF THE PEACE.

JUDGMENT OF JUSTICE OF PEACE NOT ENTERED IN TIME VOID. — When a
justice of the peace fails to enter a judgment until more than ninety
days after a verdict has been returned in the case, a judgment then ren-
dered by him is without jurisdiction and void; and if the judgment
debtor does not hear of the entry of such judgment until more than a
year after it is made, he may then maintain an action in equity to have
the judgment canceled. *Tomlinson v. Litts*, 458.

See EXECUTION, 1, 4.

JUSTIFICATION.

See FALSE IMPRISONMENT.

LANDLORD AND TENANT.

AN ACTION FOR RENT cannot be sustained unless the relation of landlord
and tenant has existed between the plaintiff and the defendant. *War-
neck v. Harlow*, 209.

See HOMESTEAD, 2; INSURANCE, 1, 5; REAL PROPERTY, 1.

LARCENY.

1. **INDICTMENT FOR, SUFFICIENT WITHOUT ALLEGING VALUE OF EACH SEPA-
RATE ARTICLE STOLEN.** — An information or indictment which charges
the larceny of several articles need not necessarily allege the value of
each separate article charged to have been stolen. *State v. Brew*, 904.
2. **FOR A SERVANT TO CONVERT PROPERTY DELIVERED TO HIM BY A THIRD
PERSON** for his master is not larceny, provided he does so before the

goods have reached their destination, and something more has happened to reduce him to a mere custodian; while, on the other hand, if the property is delivered to the servant by his master, the conversion is *larceny*. *Commonwealth v. Ryan*, 560.

See **EMBEZLEMENT; EXTRADITION, 1.**

LEASE.

See **INSURANCE, 6; TAXES, 2.**

LEGISLATURE.

See **CONSTITUTIONS, 1, 4-8; MANDAMUS, 2; STATUTES.**

LETTERS.

See **EVIDENCE, 2.**

LEVY.

See **ASSIGNMENT; EXECUTION; VENDOR AND PURCHASER, 2.**

LIBEL.

1. **WORDS ACTIONABLE PER SE.**—A newspaper publication falsely stating that a certain person or persons "were arrested and lodged in jail to-day, on charge of theft," is libelous, and actionable *per se*. *Belo v. Fuller*, 75.
2. **WORDS WHICH IMPUTE GUILT OF CRIME** punishable with imprisonment are actionable *per se*, without making the charge in express terms. They are actionable if they consist of a statement of facts which would naturally and presumably be understood by the hearers or readers as a charge of such crime. *Belo v. Fuller*, 75.
3. **ALL PERSONS ARE LIABLE WHO ENGAGE IN PUBLISHING OR CIRCULATING** a libel; and by reason of the doctrine of the several liability of tort-feasors, the remedy may be pursued against one or more of those guilty of the wrong. *Belo v. Fuller*, 75.
4. **LIABILITY OF CORPORATION.**—A corporation is civilly liable for a libel; and if it publishes and circulates a libel by the aid and assistance of others, all are equally liable in a civil action, either jointly or severally. *Belo v. Fuller*, 75.
5. **LIABILITY OF MEMBERS OF CORPORATION** for a libel published by it does not arise from the fact that they are share-holders or members alone, but springs only from their active agency in producing and circulating the libel. *Belo v. Fuller*, 75.
6. **LIBEL BY CORPORATION—LIABILITY OF STOCKHOLDERS.**—When a libel is published and circulated by a newspaper corporation, its stockholders and officers are not liable from the mere fact of their membership therein. To render them responsible for such libel, it must also be shown that they in some way aided, assisted, and advised its publication or circulation, or that their duties to the corporation are of such character and nature as to charge them with the performance of functions concerning the publication or circulation of the paper, whereby they knew, or should have known, of the publication or circulation of such libel. *Belo v. Fuller*, 75.
7. **PRESUMPTION OF INJURY.**—It is presumed, without proof of damage, that the unauthorized publication of actionable words charging an

infamous crime injures the character, reputation, and mental feelings of the party against whom the libel is directed. *Belo v. Fuller*, 75.

2. **ACTUAL DAMAGES RECOVERABLE WITHOUT PROOF OF MALICE.** — When defamatory and libelous words charge an actionable crime, actual damages, including mental suffering and loss of character, are recoverable, even in the absence of malice. *Belo v. Fuller*, 75.

LICENSE

1. **PAROL LICENSE.** — **EASEMENT CANNOT BE IMPOSED** upon land by force of a parol license, especially when the parol contract has not been proved to the point of demonstration, and the revocation of the license will not work a considerable or irreparable damage to the licensee. *Lawrence v. Springer*, 702.
 2. **LICENSE TO TAKE POSSESSION AND TO ERECT IMPROVEMENTS UPON REAL PROPERTY** results when a person having a possessory right causes it to be generally understood that he is glad to see buildings and other improvements put upon property, and that he will not regard nor treat as trespassers those who erect them and occupy his land. *Metcalf v. Hart*, 122.
 3. **A LICENSE MAY BECOME AN AGREEMENT FOR A VALUABLE CONSIDERATION**, as where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the licensee has made improvements or invested capital in consequence of a license, he has become a purchaser for a valuable consideration. *Metcalf v. Hart*, 122.
 4. **A BARE LICENSEE MUST TAKE PREMISES AS HE FINDS THEM**, and has no cause of action if injured on account of dangers there existing. The owner does not owe him any duty to care for him, or to see that he does not go to a dangerous place. *Redigan v. Boston etc. Railroad*, 520.
 5. **PAROL LICENSE TO DRAIN LAND** over the land of another is revocable, in the absence of proof that its revocation will work irreparable damage to the licensee. *Lawrence v. Springer*, 702.
 6. **A SIMPLE PAROL LICENSE MAY BE REVOKED** by the licensor at any time, and is revoked by his death, or the sale of the real property involved. *Metcalf v. Hart*, 122.
 7. **A LICENSE COUPLED WITH AN INTEREST IS NOT REVOCABLE** by the conveyance of the realty to which it relates. *Metcalf v. Hart*, 122.
 8. **REVOCATION OF LICENSE DOES NOT UNDO WHAT HAS BEEN DONE UNDER IT**, nor make that unlawful which was lawful when done. *Metcalf v. Hart*, 122.
 9. **RIGHTS OF PARTIES ON THE REVOCATION OF.** — When a party has been permitted to enter upon land under an agreement that he may do so and erect improvements thereon, and that he would be allowed to purchase such land for a small or nominal consideration, and such agreement is not enforceable, because both parol and uncertain in its terms, and the license given to him to occupy is revoked, both he and the owner of the land must be treated as having an interest therein, and he should be allowed the value of his improvements, and such value should be made a lien on the property, and unless their value is paid into court for his use, the property should be sold, and the proceeds divided between him and the land-owner in proportion to their respective interests. *Metcalf v. Hart*, 122.
- See **ATTORNEY AND CLIENT; EJECTMENT; EQUITY**, 3; **INTERSTATE COMMERCE**, 1; **MUNICIPAL CORPORATIONS**, 3, 16, 17; **RAILROADS**, 18; **STATUTES**, 17; **TAXES**, 6.

LIENS.

See ATTORNEY AND CLIENT, 2; EXECUTION, 1, 4; JUDGMENTS, 7; MORTGAGES, 6, 11; MECHANIC'S LIEN.

LIMITATIONS OF ACTIONS.

1. **BONUS STOCK.** — STATUTE OF LIMITATIONS in a suit by creditors of an insolvent corporation to compel holders of bonus stock to make payment therefor does not commence to run prior to the insolvency of the corporation. *Hospes v. Northwestern Mfg. Co.*, 637.
2. **LIMITATION TO AVOID DEED FOR FRAUD.** — An action to avoid a deed on the ground of fraud is barred by the statute of limitations in four years. The statute begins to run from the discovery of the fraud, or from the time when it ought to have been discovered by the exercise of proper diligence and inquiry. *Chicago etc. R'y Co. v. Titterton*, 30.

See BANKS, 5.

LIS PENDENS.

1. **THE HOLDER OF AN UNRECORDED DEED** cannot be affected by a judgment in a suit brought by his grantor after the execution of the deed, though the notice of the pendency of the suit is filed and recorded before such deed. The holder of an unrecorded conveyance, made before the commencement of an action, cannot be regarded as a purchaser *pendente lite*. *Warnock v. Harlow*, 209.
2. **ASSIGNEE OF MORTGAGE CHARGEABLE WITH NOTICE OF.** — An assignee of a mortgage is chargeable with notice of an action pending at the time the assignment is made, and which affects the interest conveyed by the mortgage. *Bowman v. Anderson*, 473.

MAGISTRATE.

See MALICIOUS PROSECUTION, 1.

MALICE.

See CRIMINAL LAW, 5; FALSE IMPRISONMENT, 1; LIBEL, 8; WATER, 5.

MALICIOUS PROSECUTION.

1. **ADVICE OF MAGISTRATE.** — As evidence tending to show probable cause, the prosecutor should be permitted to prove that he went to a justice, who was also an attorney at law, and fairly disclosed to him all the facts within his knowledge, and was thereupon, by such justice, advised that the proper method of procedure was by a criminal complaint, and that, acting in good faith upon such advice, he caused the complaint to be made and signed, and swore to the same. *Monaghan v. Cox*, 555.
2. **BELIEF IN PLAINTIFF'S GUILT IS INDISPENSABLE.** — In an action for malicious prosecution, it is no defense that the prosecution was instituted by the defendant upon the advice of counsel, after a full and fair statement to him of all the material facts in the case, when it appears that the defendant did not believe the accused to be guilty. *Johnson v. Miller*, 514.
3. **GENERAL VERDICT IN ACTION FOR, PRESUMPTION ARISING FROM.** — Where the jury return a general verdict in favor of the plaintiff in an action for malicious prosecution, it must be presumed, in the absence

of a special finding to the contrary, that they found that the criminal prosecution complained of was instituted by the defendant. *Johnson v. Miller*, 514.

4. **PROBABLE CAUSE, WANT OF, INFERRED FROM GENERAL VERDICT WHEN.** — From a general verdict for the plaintiff in an action for malicious prosecution, it may be inferred that the jury found a want of probable cause, and such general verdict is reconcilable with a special finding of facts sufficient to warrant a suspicion of the plaintiff's guilt, but not sufficient to lead to a belief of his guilt, upon the theory that the defendant did not believe the plaintiff to be guilty. *Johnson v. Miller*, 514.

MANDAMUS.

1. **IRRIGATION.** — **MANDAMUS IS AN APPROPRIATE REMEDY** to compel the delivery of water for irrigation purposes. *Combs v. Agricultural Ditch Co.*, 275.
2. **MANDAMUS AGAINST LEGISLATURE.** — The members of the legislative department of a state cannot be directly controlled by *mandamus* in the exercise of their legislative powers. *Greenwood Cemetery etc. Co. v. Routt*, 284.
3. **MANDAMUS AGAINST GOVERNOR.** — The official discretion of the governor of a state cannot be controlled by *mandamus*. This writ will be allowed in a proper case to command action, but it cannot be used to control discretion. *Greenwood Cemetery etc. Co. v. Routt*, 284.
4. **MANDAMUS AGAINST GOVERNOR.** — The writ of *mandamus* will not lie to control the action of the governor of a state in the exercise of any of his political or governmental powers, whether such powers are conferred upon him by the constitution or by statute. *Greenwood Cemetery etc. Co. v. Routt*, 284.
5. **MANDAMUS AGAINST GOVERNOR — WHEN WILL LIE.** — When, in the exercise of some official power neither political nor essentially governmental, the law specially enjoins upon the governor of a state as a duty the performance of some particular act, under circumstances in which he has no discretion, and his refusal to perform the act deprives a party of his property or of some legal right, *mandamus* will lie against the governor to compel the performance of such ministerial act, in the absence of other plain, speedy, or adequate remedy at law. *Greenwood Cemetery etc. Co. v. Routt*, 284.
6. **MANDAMUS AGAINST GOVERNOR TO COMPEL ISSUANCE OF LAND PATENT.** — *Mandamus* will lie against the governor of a state to compel him to perform a merely ministerial act in signing, executing, and delivering a patent to public land, which has been regularly sold by the state board of land commissioners of which he is a member, provided the purchaser has paid or tendered the full purchase price, and has otherwise complied with all conditions of the purchase. *Greenwood Cemetery etc. Co. v. Routt*, 284.

MARRIAGE.

See DEEDS, 7, 8.

MARRIED WOMEN.

See ACKNOWLEDGMENTS; HOMESTEAD, 2; HUSBAND AND WIFE; MECHANIC'S LIEN, 4.

MASTER AND SERVANT.

1. **CONTRACTOR AND EMPLOYER.** — IF THE CARRYING OUT OF A CONTRACT IS NECESSARILY INJURIOUS to a third person, the doctrine of *respondent superior* applies. *Williams v. Fresno Canal etc. Co.*, 172.
2. **CONTRACTOR AND EMPLOYER.** — FOR AN ACT OF A CONTRACTOR IN FLOWING UP THE LAND OF A THIRD PERSON, and using part thereof in constructing or repairing a canal, his employer is answerable, if it appears that it was part of the contract that the work should involve the using of such land. *Williams v. Fresno Canal etc. Co.*, 172.
3. **VICE-PRINCIPAL, WHO IS — NEGLIGENCE TOWARD MINOR EMPLOYEE.** — A local boss, or foreman, with authority to control and direct the men and machinery employed, and to discharge such men at pleasure, is a vice-principal, and not a fellow-servant, and the master is liable for his negligence in ordering a minor employee into a situation of danger, and to perform an act entirely beyond the scope of his employment, if in obeying the order such employee is killed or injured. *Orman v. Mannix*, 340.
4. **VICE-PRINCIPAL.** — IF THE DUTY TO PROVIDE A SAFE PLACE in which the servant is to do his work is by the master confided to another servant or employee, the employer is responsible, if the duty is so negligently done that injury results. The duty of providing for the safety of employees rests on the employer, and cannot be delegated. *Louisville etc. R'y Co. v. Hanning*, 443.
5. **LIABILITY OF MASTER FOR ACT OF VICE-PRINCIPAL.** — When a subordinate employee is injured through the negligence of a vice-principal, the master is liable in the same manner as if he had been personally present and committed the negligent act himself. *Sweeney v. Gulf etc. R'y Co.*, 71.
6. **LIABILITY OF MASTER OR VICE-PRINCIPAL FOR ORDERING SERVANT INTO DANGER.** — When a master wrongfully sends his servant into a dangerous place, or exposes him to a risk not connected with the service, in consequence of which he is injured, the master is liable; and if, instead of being thus sent by the master, he is sent by one whom the master has placed in authority over him, and to whose orders he is subjected, the liability of the master is the same. *Orman v. Mannix*, 340.
7. **LIABILITY OF MASTER FOR ACT OF VICE-PRINCIPAL.** — When a boy fourteen or fifteen years of age is engaged to work for his employer in a non-hazardous service, and is placed by his employer under the control and subject to the order and direction of a foreman, who orders him to do a thing which in its nature is perilous or hazardous to life or limb, and which is outside the duties and employment of the boy, but within the scope of the employment of the foreman, and in an attempt to perform such act in obedience to such order, the boy is killed or injured, the giving of such order by the foreman is negligence for which the employer is liable, and the fact that the boy would have been justified in refusing to obey such order will not exonerate his employer from liability. *Orman v. Mannix*, 340.
8. **VICE-PRINCIPAL AND FELLOW-SERVANTS.** — The mere fact that the servant whose negligence produces the injury is superior in rank to the servant injured does not alone fix the liability of the master. If the negligent servant can fairly be said to take the place of the master, and represent him so as to become in reality a vice-principal, and the negligence occurs in the discharge of his representative duties, the master is liable. *Colorado etc. R'y Co. v. Naylor*, 335.

9. **NEGLIGENCE OF FELLOW-SERVANT.** — When a molder in a factory, called upon to assist in pouring heated metal into molds prepared by other molders in the employ of the master, is injured by the escape of such metal from a defective mold, and it is shown that the molds furnished are numerous, and that no employee is required to use a defective mold, while accidents of the kind stated are of frequent occurrence, the employee thus injured cannot recover from the master, as the negligence, if any, is that of a fellow-servant. *Kehoe v. Allen*, 608.
10. **DUTY OF MASTER AS TO MACHINERY AND APPLIANCES.** — Every master must exercise ordinary care, skill, and prudence in furnishing machinery and appliances suitable for doing the work in hand, and must exercise like care and caution in employing competent fellow-servants; and when others are given charge of the whole or a portion of the work, the master is required to use reasonable care and caution in the selection of competent assistants for such positions. *Orman v. Mannix*, 340.
11. **MASTER IS BOUND TO FURNISH AND MAINTAIN SUITABLE INSTRUMENTALITIES** for the work or duty which he requires of his employees, young or old, and failing in this he is liable for any damages flowing from such neglect of duty. When the servant, in obedience to the order of the master, incurs the risk of machinery, which, though dangerous, is not so much so as to threaten immediate injury, or when it is reasonably probable it may be safely used only by extraordinary caution or skill, the master is liable for resulting accident. *Kehler v. Schwenk*, 777.
12. **NEGLIGENCE TOWARD MINOR EMPLOYEE — EVIDENCE.** — In an action by a minor employee to recover for injuries received while running a dumper for his master, evidence that the dumper-track had rotten ties, loose rails, and projecting ends of ties, with holes in the ground between the ties, both inside and outside the rails, and was in such a condition of non-repair as would most probably and naturally occasion the stumbling of any person, young or old, while engaged in the performance of so hazardous a service, is admissible as tending to show negligence on the part of the master. *Kehler v. Schwenk*, 777.
13. **NEGLIGENCE TOWARD MINOR EMPLOYEE — EVIDENCE.** — In an action by minor employee to recover for injuries received while operating a dumper for his master, evidence that a different kind of dumper was in general use at other collieries, and that it was entirely free from the arrangement which constituted the dangerous character of the one in use at defendant's colliery, is admissible as tending to show negligence on the part of the master in not furnishing safe machinery and appliances with which to do the work. *Kehler v. Schwenk*, 777.
14. **DUTY TO MINOR EMPLOYEES.** — It is the duty of every master to take notice of the age and ability of his young employees, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they should not be exposed. Failing in this duty, the master is liable for injury resulting therefrom. *Kehler v. Schwenk*, 777.
15. **MINOR EMPLOYEES.** — In actions by young servants against their employers, the inexperience of the servant and want of specific instruction as to the dangers of the service are recognized as sources of liability against the master. *Kehler v. Schwenk*, 777.
16. **MINOR EMPLOYEES.** — When a minor employee is very young, with no knowledge by experience or instruction as to the risks of a particularly dangerous service, in which he was not at first employed, but into which

he was urged by the master against his will, and the appliance from which the injury arose was only in partial use, while another simple device which practically removed all danger was in extensive use, the master is guilty of negligence, and the servant is entitled to recover. *Kehler v. Schwank*, 777.

17. MINOR EMPLOYEES who have sufficient judgment to know that an employment is dangerous, and nevertheless engage in it voluntarily, cannot recover, notwithstanding their youth; but if, because of their youth, they have not sufficient knowledge to appreciate the danger, or to know better than to engage in so dangerous a service, then they cannot be deemed to be guilty of contributory negligence. *Kehler v. Schwank*, 777.
18. MINOR EMPLOYEE—CONTRIBUTORY NEGLIGENCE, WHEN NOT IMPUTED.—Contributory negligence cannot be imputed to a minor employee of tender years in obeying orders, when he is not shown to have had any information with reference to the dangerous nature of the business into which he was ordered by his superior, and which was entirely outside the services he was employed to perform. *Orman v. Manakz*, 340.
19. IF A MASTER REQUIRES OF A SERVANT A SERVICE OUTSIDE OF THE DUTIES ordinarily incident to his employment, and subjecting him to additional danger, he does not necessarily assume the additional hazard in undertaking to perform the unusual and extra service, even though the dangers attending it are obvious. If the apparent danger is such that a person of ordinary prudence would refuse to encounter it, the employee proceeds at his peril. Otherwise he may undertake the service, using care proportionate to the apparent increased risk, and if, in so doing, he is injured by the employer's fault, he may recover therefor. *Louisville etc. R'y Co. v. Hanning*, 443.
20. DANGER SIGNALS, OMISSION OF.—If a railway employee is put to work under a car on a side-track outside of the line of his usual duties, and where his safety requires the placing of danger signals to warn persons in charge of other trains of his presence and peril, he is not chargeable with contributory negligence because he relies upon the duty of his employer to place such signals, and does not himself examine and ascertain whether they are in position. If he was ordered to do special work by his foreman, he had the right to assume, in the absence of warning or notice, that his superior would give the order, and would not by his own negligence make the work unsafe. *Louisville etc. R'y Co. v. Hanning*, 443.
21. EVERY SERVANT ASSUMES THE OBVIOUS RISKS of the service into which he enters, however dangerous the business may be, and though it may easily be conducted more safely by the employer. *Fitzgerald v. Connecticut etc. Paper Co.*, 537.
22. RISKS ASSUMED BY SERVANT.—When one engages in the service of another, he assumes, as between himself and his employer, all the ordinary and usual risks incident to the business upon which he is about to enter. *Orman v. Manakz*, 340.
23. ASSUMPTION OF RISKS—SERVANT WORKING OVERTIME in the line of his employment assumes the usual risks thereof. *Kalos v. Allen*, 608.
24. RISK, ASSUMPTION OF.—ONE DOES NOT VOLUNTARILY ASSUME A RISK, who merely knows that there is some danger, without appreciating the danger. *Fitzgerald v. Connecticut etc. Paper Co.*, 537.

- 38. MASTER'S LIABILITY — ASSUMPTION OF RISKS.** — While a master is not liable for accidents occurring to his servant from the ordinary risks and dangers incident to the business in which he is engaged, yet when the master voluntarily subjects his servant to dangers such as in good faith he ought to provide against, he is liable for any accident arising therefrom. *Kehler v. Schwenk*, 777.
- 39. SAFE MACHINERY — ASSUMPTION OF RISKS.** — Every servant has a right to suppose that his master has provided such guards and means of protection from injury, in the use of machinery, tools, and appliances, as are usual and reasonably necessary for his safety, and he cannot be held to have assumed risks attendant on their absence, unless such absence is apparent, or his attention has been called to it. *Kehler v. Schwenk*, 777.
- VOLUNTARY ASSUMPTION OF RISK — QUESTION FOR THE JURY.** — It cannot be said, as a matter of law, that a servant voluntarily assumes the risk of injury from slippery steps merely because she attempted to descend them, knowing that they were icy, and that there was some danger in passing over them, if their condition in regard to slipperiness was constantly changing in different states of the weather, and there is evidence tending to prove that she had no other way of leaving the mill in which she was employed. *Fitzgerald v. Connecticut etc. Paper Co.*, 557.
- See EMBEZZLEMENT; LARCENY, 2; PLEADING, 9; RAILROADS, 10, 21-25; RECEIVERS, 1-3, 5, 6; SERVICES; SHIPPING; STATUTES, 15; WITNESSES, 1.**

MECHANIC'S LIEN.

- 1. MECHANIC'S LIEN ONLY MAINTAINABLE FOR MATERIAL TO BE USED IN PARTICULAR BUILDING.** — If materials are sold and delivered to a contractor without any knowledge on the part of the seller that they are to be used in the construction of a particular building, no lien can be maintained against the owner of such building. *Whittier v. Puget Sound Loan etc. Co.*, 944.
- 2. MECHANIC'S LIEN CANNOT EXIST EXCEPT WHERE THERE WAS A VALID CONTRACT** for the doing of work or the furnishing of materials. *Fish v. McCarthy*, 237.
- 3. MECHANIC'S LIEN CANNOT BE ENFORCED AGAINST THE PROPERTY OF MINORS**, where the contract under which the work was done or materials furnished was entered into on their behalf by their guardian without first obtaining an order of court authorizing him so to do. *Fish v. McCarthy*, 237.
- 4. MECHANIC'S LIEN AGAINST THE PROPERTY OF A MARRIED WOMAN.** — If a married woman enters into a contract for the sale of real property, one of the provisions of which is that the vendee shall build a dwelling thereon, and such contract is invalid because her husband did not join therein, but the vendee enters into an agreement, with her knowledge and consent, for the building of the foundation of such dwelling, the contractor with whom this agreement is made is entitled to a mechanic's lien against the property, which he may enforce against the married woman, though the contract of purchase could not have been enforced against her, and has been abandoned. *Allen v. Tarbox*, 616.
- 5. MECHANIC'S LIEN UPON LAND HELD BY HUSBAND AND WIFE AS TENANTS BY THE ENTIRETIES** may be enforced as against her, if based upon a just claim for materials used in constructing a barn on the premises, when she knew of the intention of her husband to construct the barn.

and purchase materials therefor, and made no objection thereto. *Wilson v. Logue*, 426.

6. MECHANIC'S LIEN THE NOTICE OF WHICH IS RECORDED IN THE WRONG BOOK is not invalid on that account. *Wilson v. Logue*, 426.

MENTAL ANGUISH.

See DAMAGES, 1; LIEBEL, 7, 8.

MERGER.

See JUDGMENTS, 14, 15; NEGOTIABLE INSTRUMENTS, 2.

MILLS.

See PARTITION, 1.

MINES.

See REAL PROPERTY, 4.

MISTAKE.

See APPEAL, 2; INSURANCE, 1, 5; JUDGMENTS, 22, 23.

MORTGAGES.

1. A CONVEYANCE ABSOLUTE IN FORM will be adjudged to be a mortgage, when it is shown, by evidence clear, certain, unequivocal, and trustworthy, that such instrument was executed, delivered, accepted, and intended by the parties to secure the payment of a debt. But when there is a substantial conflict in the evidence, a mere preponderance thereof is not sufficient to warrant a change in the character of a deed or other solemn instrument in writing. *Perot v. Cooper*, 258.
2. DEED SHOULD NOT BE DECLARED A MORTGAGE, UNLESS the evidence leaves in the mind of the trial judge a clear and satisfactory conviction that the instrument, which in form is a conveyance, was by all the parties thereto intended as a mortgage. *Mahoney v. Bostwick*, 175.
3. DEED CLAIMED TO BE A MORTGAGE. — THE PRESUMPTION OF LAW IS, that an instrument is what on its face it purports to be; and this presumption, when a conveyance is claimed to have been intended as a mortgage, should be allowed to prevail, unless the evidence to the contrary is plain and convincing; but whether the evidence is of such character and strength as to produce this conviction, is a question for the trial court to determine. *Mahoney v. Bostwick*, 175.
4. DEED SUBJECT TO MORTGAGE — SATISFACTION OF MORTGAGE DEBT. — When an estate subject to a mortgage is sold by the mortgagor in parcels at different times, the mortgage must be satisfied, first out of that portion of the estate still in the hands of the mortgagor, and then out of the parcels sold, in the inverse order of alienation. This rule may be modified by recitals in the deeds showing a different intent. *Stephens v. Olaj*, 328.
5. DEED SUBJECT TO MORTGAGE — RIGHTS OF MORTGAGEE — SATISFACTION OF MORTGAGE. — When an estate subject to a mortgage is sold by the mortgagor in parcels, no right of the mortgagee is disturbed by these transactions, save that under some circumstances a court of equity may require him, first, to exhaust the parcel retained by the mortgagor, or the parcels conveyed, as the case may be, in satisfaction of his mortgage debt, according to the intent of the parties. *Stephens v. Olaj*, 328.

6. **LIEN OF SECRET OR UNRECORDED MORTGAGE DISPLACED BY THAT OF SUBSEQUENT RECORDED MORTGAGE.** — The lien of a secret or unrecorded mortgage is displaced by that of a mortgage subsequently delivered and duly recorded, even though such recorded mortgage is given to secure an antecedent indebtedness. Where, therefore, after a recorded mortgage to secure future advances for the current year has been satisfied in fact, an agreement, not recorded, is made to continue such mortgage for advances of the next year, and after some advances are made thereunder the mortgagor makes another mortgage to a third person, who has no knowledge of the prior mortgage, to secure an antecedent debt, which latter mortgage is duly recorded, this recorded mortgage will have priority over the secret lien of the unrecorded agreement. In such case, the record of the later mortgage was notice to the prior mortgagees from its date, and the advances made by him after that date were at his peril. And the mortgagor, by executing the second mortgage, deprived himself, by his own act, of the right to demand further advances under the agreement. *Norwood v. Norwood*, 875.
7. **MORTGAGEE WHO ENTERS INTO POSSESSION WITHOUT THE CONSENT OF THE MORTGAGOR,** and wrongfully ousts him therefrom, is liable to be charged with the rents and profits, the same as any other disseisor, and is not entitled to any accounting to determine how much he may have actually realized from his wrongful occupation, after deducting the necessary expenses of carrying on the farm. *Mahoney v. Bostwick*, 175.
8. **MORTGAGEE WRONGFULLY TAKING POSSESSION IS NOT TO BE CREDITED** with the value of fencing, ditching, and other improvements placed on the premises while he was holding them adversely to the mortgagor. Nor can the mortgagee recover for such improvements by proof that the mortgagor himself intended to make and would have made them, had he not been dispossessed of his land. *Mahoney v. Bostwick*, 175.
9. **MORTGAGEE CANNOT REQUIRE, AS A CONDITION OF REDEMPTION,** the payment of any other debt not a lien upon the land. *Mahoney v. Bostwick*, 175.
10. **MORTGAGE — REDEMPTION.** — THE PAYMENT OF A DEBT NOT SECURED by a mortgage cannot be exacted as a condition of redemption therefrom. The maxim that a complainant seeking equity should be compelled to do equity applies only when the relief sought by him and the right demanded by the defendant belong to or grow out of the same transaction. *Mahoney v. Bostwick*, 175.
11. **REDEMPTION BY GRANTEE OF MORTGAGOR AFTER JUNIOR LIEN-HOLDER'S RIGHT TO REDEEM IS BARRED, EFFECT OF.** — When a mortgagor, after a senior mortgage is foreclosed, and after the right of a junior mortgagee to redeem from the foreclosure sale is barred by lapse of time, conveys his interest in the land mortgaged, his grantee may redeem without removing such bar, and thus perfect in himself the title to the land sold. Such grantee will then hold the land discharged from the lien of the junior mortgage, and may maintain an action in equity to quiet his title as against such lien. *Moody v. Funk*, 455.
- See DEEDS, 2, 11; ESTOPPEL; EXECUTORS AND ADMINISTRATORS, 1; FIXTURES; FRAUDULENT CONVEYANCES, 4; GUARANTY, 2; HUSBAND AND WIFE, 2; LIT PENDENS, 2; NEGOTIABLE INSTRUMENTS, 2; REAL PROPERTY, 1; TRUSTS, 5, 9, 10; VENDOR AND PURCHASER, 2, 5.

MUNICIPAL CORPORATIONS.

1. **MUNICIPAL CORPORATION HAS NO POWER TO MAKE THE RIGHT OF A PERSON TO FOLLOW HIS BUSINESS** at any place he may select dependent upon the will of any number of citizens or property owners within its limits. *Ex parte Stag Lee*, 218.
2. **CONSTITUTIONAL LAW — LAUNDRIES, UNREASONABLE RESTRICTION OF RIGHT TO MAINTAIN.** — A municipal corporation, though authorized by the state constitution to make and enforce such police, sanitary, and other regulations as are not in conflict with general laws, has no power to restrict the business of carrying on public laundries within its limits to two designated blocks of land, unless a permit is first obtained from its board of trustees, the ordinance prohibiting the granting of such permit without the written consent of a majority of the owners of real property within the block in which it is proposed to establish the business, and also within the four blocks adjacent thereto. *Ex parte Stag Lee*, 218.
3. **CONSTITUTIONAL LAW — EMPLOYMENT OF WOMEN IN DRAM-SHOPS.** — A municipal ordinance imposing license taxes upon places in which intoxicating liquors are sold in less quantities than one quart, to be drank or used upon the premises, and exacting a much greater fee for such license if any female is employed in any capacity whatever, is not unconstitutional, though the constitution of the state declares that no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession. *Ex parte Felcklin*, 223.
4. **POLICE POWER — LIABILITY FOR NEGLIGENT ACT OF OFFICER.** — The enactment and enforcement of a city ordinance forbidding unmuzzled dogs to run at large is the valid exercise by a municipal corporation of its police power; and when it, by ordinance, directs and orders the killing of unmuzzled dogs found running at large upon its streets, and appoints or employs its policeman, and makes it his duty, and directs and orders him, to execute and carry out such ordinance and kill all such dogs, the city is not liable for the negligent and careless act of such policeman in executing such orders and duty, even though in so doing he inflicts painful and serious wounds upon a person lawfully upon the street. *Whitfield v. Paria*, 60.
5. **LIABILITY FOR NEGLIGENT ACTS OF OFFICERS OR EMPLOYEES.** — A city while acting, not in the management of its private or corporate affairs, but in the interest of the public, and as the guardian of the health, peace, convenience, and welfare of the public, is not liable for the negligent acts of its officers or employees engaged in the execution of its ordinances. *Whitfield v. Paria*, 60.
6. **MUNICIPAL CORPORATION, LIABILITY OF, FOR NEGLIGENT ACTS OF ITS EMPLOYEES.** — In an action to recover damages resulting from the negligence of the employees of a department of a city government in leaving open and unguarded an excavation in one of its streets, made by them for the purpose of enabling plumbers to connect the water-mains owned by the city with a private residence, with whose owner the plumbers contracted to make such connection, where such employees were paid by the city, but the amount paid to them was afterwards refunded to the city by the plumbers, the work having been done under the direction of the superintendent of the water-works of the city, and an ordinance or by-law prohibiting any person except such superintendent, or some person employed by him, or the board of water commissioners, from tapping or making any connection with the mains, unless by the

permission or under the direction of the superintendent, the question whether the plumbers or the city sustained the relation of master to such employees is one of fact for the jury, whose finding against the city is conclusive that the city itself caused the excavation to be made and left it unguarded. *Wilson v. Troy*, 817.

7. MUNICIPAL CORPORATION IS NOT LIABLE FOR SO GRADING a street as to prevent the flow of surface water from an adjacent lot. *Ourcoran v. Benicia*, 171.
8. ACCUMULATION OF ICE ON STREET — NEGLIGENCE. — A defective construction of a street, in conjunction with an accumulation of ice thereon, casts upon the municipality the duty of removing the obstruction on notice, and a failure to perform such duty is negligence. *Decker v. Scranton*, 757.
9. LIABILITY FOR ALLOWING ICE TO ACCUMULATE ON DEFECTIVE STREET. — When ice has accumulated on a street by reason of neglect on the part of the city to construct and maintain suitable drains to carry surface water away, the city is liable to a person injured by slipping and falling upon such ice. *Decker v. Scranton*, 757.
10. NEGLIGENCE OF CITY — PROXIMATE CAUSE. — When it is negligence on the part of a city, at the time of an injury, to have failed to remove a lumber-pile from a street, and this failure and the act of a drayman both concur in causing the injury, without contributory negligence on the part of the party injured, the city is liable, no matter whether the act of the drayman was negligent or not. *Gonzales v. Galveston*, 17.
11. NEGLIGENCE OF CITY — PROXIMATE CAUSE. — When it is negligence on the part of a city to fail to remove a lumber-pile from a street, the fact that the lumber was carefully and safely piled is immaterial, provided its being there is a concurring proximate cause of the injury sued for. *Gonzales v. Galveston*, 17.
12. NEGLIGENCE OF CITY — PROXIMATE CAUSE — QUESTION FOR JURY. — If the presence of a lumber-pile in a street at the time of an accident is chargeable to the negligence of a city, and such negligence, together with the act of a drayman, causes an injury to a person guilty of no contributory negligence, the negligence of the city is part of the proximate cause, for which it is liable. These issues should be determined by the jury from all the facts, taking into consideration the powers, duties, and rights of the city under its charter and ordinances. *Gonzales v. Galveston*, 17.
13. NOTICE TO MUNICIPAL CORPORATION OF DEFECT IN STREET NOT NECESSARY WHEN. — In an action brought by a person injured by the neglect of a city to properly guard a place in its street, made dangerous by its own act, it is not necessary to prove notice to it of the defect. *Wilson v. Troy*, 817.
14. COUNTIES AND CITIES — RESPECTIVE LIABILITY FOR NEGLIGENCE. — Cities, independent of statute, are liable to respond in damages for injuries resulting from a failure to discharge their corporate duties, while counties or other quasi municipal corporations are not liable for similar injuries, unless such liability is expressly or impliedly created by statute. *Helgel v. Wichita County*, 63.
15. STREET, APPROPRIATION OF, TO PURPOSE OTHER THAN PUBLIC PASSAGE, SUBORDINATE. — Since the primary and dominant purpose of a street is for public passage, any appropriation of it by legislative sanction to other objects must be deemed to be in subordination to this use, unless

a contrary intent is clearly expressed. And therefore the inconvenience or loss which others may suffer from the adoption of a mode of locomotion authorized by law, which is carefully and skillfully employed, and which does not destroy or impair the usefulness of a street as a public way, is not sufficient cause for a recovery, unless there is some statute which makes it actionable. *Hudson River Telephone Co. v. Waterford Turnpikes etc. Co.*, 838.

16. **POLICE POWER — LICENSE TAX ON BANKS.** — Banks may be subjected to a license fee or occupation tax by municipalities under express legislative authority; but in the absence of such authority, they are not so liable. *Oil City v. Oil City Trust Co.*, 770.
 17. **POLICE POWER — LICENSE TAX ON BANKING — PRESUMPTION.** — When an ordinance on its face purports to impose a license tax on the occupation of banking under an exercise of the police power, it will be presumed that it imposes an occupation tax, and not a tax for revenue, if its good faith and the reasonableness of the amount imposed are not questioned. *Oil City v. Oil City Trust Co.*, 770.
 18. **PROPERTY OF, SUBJECT TO EXECUTION.** — Residence property conveyed to and received by a city from its tax collector as a settlement of taxes collected by him and not paid over, such property not being adapted to or used by the city for any public purpose, is not exempt from sale under execution. *City of Sherman v. Williams*, 66.
 19. **SPECIAL FUNDS — EXECUTION AGAINST.** — When a city tax collector collects duly authorized taxes for a special city fund, and, failing to pay them over, the city takes a conveyance from him of his city residence property in settlement therefor, the property so acquired takes the place of such fund; and as the latter cannot be diverted to any other purpose than that for which it is created, it is not subject to execution in favor of a general creditor of the city, notwithstanding the fact that the municipal authorities may have misapplied the rents received from such property. *City of Sherman v. Williams*, 66.
- See **INTERSTATE COMMERCE**, 1; **RAILROADS**, 7, 28-30; **TAXES**, 6; **WATERS**, 1, 2; **WHEARVES**.

MUTUAL BENEFIT SOCIETIES.

See **ASSOCIATIONS**; **INSURANCE**, 9, 10.

NATURAL GAS.

See **INJUNCTIONS**, 2; **PERSONAL PROPERTY**; **REAL PROPERTY**, 5, 6.

NEGLIGENCE.

1. **PLEADING — NEGLIGENCE.** — A GENERAL AVERMENT in a complaint that the injured party was himself free from fault or negligence is sufficient, unless overcome by the specific averment of other facts from which the inference must be drawn that he was guilty of contributory negligence. *Louisville etc. Ry Co. v. Hanning*, 443.
2. **CONFLICT OF LAWS — RIGHTS OF ACTION UNDER STATUTES OF ANOTHER STATE.** — If the statutes of another state give a right of action for injuries to the person, whether they instantaneously result in death or not, and declare that the right shall survive to the executor or administrator, an action may be maintained by the administrator in this state for injuries suffered in the other by his intestate from the negligence of

- a railway corporation, and resulting in death, if the decedent was domiciled in this state at the time of his injury and death. *Higgins v. Central New England etc. R. R. Co.*, 544.
3. **THE PROXIMATE CAUSE** is not necessarily the last act or nearest act to the injury, but it may be such an act, wanting in ordinary care, as actively aids in producing the injury, as a direct and existing cause. It need not be the sole cause, but must be a concurring cause, such as might reasonably have been contemplated as involving the result under the attending circumstances. *Gonzales v. Galveston*, 17.
4. **NEGLIGENCE IN BLASTING** — **WHEN QUESTION FOR JURY.** — Where a blast is discharged at a place where it is not unlawful to discharge it, the fact that a man was killed by a rock thrown by the blast, at a distance of from 940 feet to 1,200 feet, in a horizontal direction, presents only a *prima facie* case of negligence, which may be rebutted by showing due care on the part of those who discharged the blast, and the question of their negligence should not be taken from the jury. *Klepeck v. Donald*, 936.
5. **KNOWLEDGE OF DANGER.** — One who, knowing the danger from the negligence of another, and understanding and appreciating the risk therefrom, voluntarily exposes himself to it, is precluded from recovering for the injury resulting from such exposure. *Fitzgerald v. Connecticut etc. Paper Co.*, 537.
6. **CONTRIBUTORY NEGLIGENCE** on the part of the plaintiff will not be presumed from the fact that she was an infant at the time of receiving the injury, and was in charge of a two-horse team. *Louisville etc. R. R. Co. v. Pritchard*, 451.
- See **COUNTIES**, 2; **DAMAGES**, 4, 5; **HOMESTEAD**, 1; **INTEREST**; **MASTER AND SERVANT**, 3-5, 8, 9, 12, 16; **MUNICIPAL CORPORATIONS**, 4-5, 8-14; **PLEADING**, 9; **RAILROADS**, 10, 22, 24, 25; **REAL PROPERTY**, 7; **RECOVERIES**, 5; **TELEGRAPHS**, 2; **TRIAL**, 5; **WITNESSES**, 1.

NEGOTIABLE INSTRUMENTS.

1. **CONSIDERATION, WHEN PRESUMED.** — When the execution and delivery of a note is admitted, the presumption is that it is founded upon a sufficient consideration. *Perot v. Cooper*, 258.
2. **CONSIDERATION, ILLEGALITY OF, WHEN MAY BE SHOWN.** — The merger of an oral contract for the sale of land, in a conveyance and mortgage executed in pursuance of such contract, cannot prevent the maker of a promissory note secured by such mortgage from showing that it was executed in pursuance of such contract and was based upon an illegal consideration. *Moffatt v. Bulson*, 192.
3. **POSSESSION, WHEN RAISES PRESUMPTION OF OWNERSHIP.** — Possession and the production of a note uncanceled and unextinguished by indorsement of payments, or otherwise, is *prima facie* evidence that the holder is the owner, and that the note is unpaid. *Perot v. Cooper*, 258.
4. **PROMISSORY NOTE, DELIVERY OF.** — Evidence tending to prove that a promissory note was given in payment of the obligation of a third person, and that it was made payable to, and was delivered to, and was received by the payee named therein as collateral security for debts due to him, does not show that the note was void for lack of delivery, but simply that the payee was the agent of the person to whom the obligation was originally due, and holds the note as collateral security. *Steebton Soc. etc. Society v. Giddings*, 181.

5. **PROMISSORY NOTE, VARYING TERMS OF.** — Evidence tending to prove that the note sued upon was made payable to the payee therein named for the purpose of securing an indebtedness which was or might become due from a third person to such payee, and that such third person was and is the real party in interest, does not vary or add to the terms of the note, and is therefore admissible, when there is an offer to prove that a defense exists which would be enforceable were such third person the plaintiff in the action. *Stockton Sav. etc. Society v. Giddings*, 181.
 6. **PROMISSORY NOTES — DEFENSES ASSERTABLE AGAINST NOMINAL PAYEE.** — If the manufacturer of a machine sells it with the warranty that it is of a certain quality or will accomplish certain purposes, and procures a non-negotiable note to be given for the purchase price, but made payable to a third person to secure debts due and to become due the latter, such nominal payee is in no better a position than if the note had been given to the manufacturer and by him indorsed; and a defense arising from the worthless character of the machine may be asserted against such payee to the same extent as if he were an indorsee. The note is subject to all infirmities and defenses that might have been made if it were still held by the manufacturer, excluding those defenses which arose between him and the payor taking place after it was executed. *Stockton Sav. etc. Society v. Giddings*, 181.
 7. **ACCOMMODATION NOTES WITH RESTRICTIONS.** — When the payee of a sealed accommodation note receives it subject to the restriction that it is to be used only in obtaining a loan, he cannot pledge it for an antecedent debt; but if he receives it without restriction as to its use, he may so pledge it. *Albion Second Nat. Bank v. Dunn*, 742.
 8. **ACCOMMODATION NOTES — DEFENSES AGAINST.** — Proof that an accommodation note was given subject to the restriction that it was only to be used in obtaining a loan is a perfect defense by the maker against it in the hands of a pledgee, to whom it has been given as security for an antecedent debt. *Albion Second Nat. Bank v. Dunn*, 742.
 9. **CO-TENANCY.** — PAYMENT TO EITHER OF TWO PAYEES named in a promissory note extinguishes it. *Delano v. Jacoby*, 201.
- See CHECKS; GUARANTY; HUSBAND AND WIFE, 2, 5; VENDOR AND PURCHASER, 5, 8.

NEXT FRIEND.

See INFANTS.

NON-RESIDENTS.

See GUARDIAN AND WARD, 1; JUDGMENTS, 1-3.

NOTICE.

1. **APPELLATE PROCEDURE.** — NOTICE to co-parties is imperatively required by the statutes of Indiana. *Hutts v. Martin*, 412.
2. **JURISDICTION OF MINORS.** — Notice to a minor of an application for the appointment of a guardian is purely a matter of statutory requirement, and, when not required by statute, need not be given. *Kurts v. St. Paul etc. R. R. Co.*, 657.
3. **JURISDICTION OF MINORS.** — If a statute declares that such notice shall be given of an application to appoint a guardian of a minor to all persons interested as the judge shall order, letters of guardianship cannot be

attacked on the ground that the notice which he directed to be given was insufficient because it did not include notice to the minors themselves. *Kurtz v. St. Paul &c. R. R. Co.*, 657.

See AGENT, 1; APPEAL, 2; ATTORNEY AND CLIENT, 2; INSURANCE, 2, 6; LES PENDING; MECHANIC'S LIEN, 6; MUNICIPAL CORPORATIONS, 13; REAL PROPERTY, 1, 2; STATUTES, 18; TAXES, 7; TRUSTS, 9, 11, 12.

OCCUPATION TAX.

See MUNICIPAL CORPORATIONS, 16, 17; TAXES, 6.

OFFICERS.

1. **OFFICERS DE FACTO — ACTS OF, CANNOT BE QUESTIONED.** — When an office has been duly created, public policy often requires that the official acts of the person actually discharging the duties thereof shall not be questioned on the ground that such incumbent has no title to the office; but this rule always presupposes the existence of an office *de jure*. *German v. People*, 359.

2. **SALARY.** — AN OFFICER SUSPENDED FROM OFFICE under and by virtue of a judgment convicting him of willful misconduct in office is, upon the reversal of the judgment, entitled to his salary during the period of such suspension, though the statute provided that during his suspension the office must be filled as in case of a vacancy and it was so filled, and the salary paid to the incumbent. *Ward v. Marshall*, 198.

3. **THE RIGHT TO RECEIVE THE SALARY IS AN INCIDENT WHICH ATTENDS THE legal title to the office.** *Ward v. Marshall*, 198.

See ATTORNEY AND CLIENT, 1; CORPORATIONS, 2, 4, 17; COUNTIES, 2; DEEDS, 3; ELECTIONS, 2, 3, 5-7; HIGHWAYS; MUNICIPAL CORPORATIONS, 4-6; TAXES, 7.

ORDINANCES.

See MUNICIPAL CORPORATIONS.

PARENT AND CHILD.

See DAMAGES, 5; DEEDS, 6.

PAROL.

See EVIDENCE, 1, 2; INSURANCE, 1; LICENSE, 1, 5-7, 8.

PARTIES.

1. **DEFECTS IN.** — If one of several heirs has brought an action to recover possession of real property, a suit in equity may be maintained against him without joining his co-heirs as defendants to enjoin his further prosecution of the action at law, and for other equitable relief. *Metcalf v. Hart*, 122.

2. **PLEADING BY PARTY SUSTAINING DUAL CHARACTER — PROPER MODE OF.** — Where a party to an action appears in two characters, — for example, as an individual and as a partner, — he ought to appear only as a plaintiff or as a defendant, setting forth his several rights in the subject-matter of the action. It is defective pleading for one and the same person to appear as both plaintiff and defendant in the same action. *Norwood v. Norwood*, 875.

See APPEAL, 2; DOWER; INSURANCE, 8; NOTICE, 1; TRIAL, 1, 8; WATERS, 9.

PARTITION.

1. OWNER OF LIFE ESTATE IN LAND MAY DEMAND. — A party having a life estate in two thirds of a mill site is entitled to demand partition between himself and the owner in fee of the other third. *Jordan v. Ness*, 869.
2. SALE OF LAND OWNED BY CO-TENANTS FOR PARTITION — POWER OF COURT OF EQUITY TO ORDER. — A court of equity has power to order a sale for partition of land owned by several tenants in common, either as distributees of an intestate's estate or otherwise. *Holley v. Glover*, 888.

See DOWER.

PARTNERSHIP.

1. RIGHTS OF PARTNERS IN PARTNERSHIP PROPERTY. — A partner's right to partnership property is an interest in all the assets of the firm, subject to the payment of the partnership liabilities. *Sindelars v. Walker*, 353.
2. RIGHT OF PARTNER TO MAINTAIN ACTION FOR INJURY TO FIRM PROPERTY. — Prior to a dissolution of the partnership and a settlement of its affairs, one partner cannot maintain an action to recover his damages for an injury to the firm property, caused by a stranger acting in collusion with his copartner, in wrongfully foreclosing a chattel mortgage upon the partnership property before the maturity of the mortgage debt. *Sindelars v. Walker*, 353.
3. INTEREST OF PARTNER IN FIRM PROPERTY, WHEN AND HOW ASCERTAINED. — The individual interest of one partner in the firm property and business can be ascertained only by a settlement of the partnership; and this applies to the interest of a partner in the profits or goodwill of the partnership business, as well as to the tangible assets of the firm. *Sindelars v. Walker*, 353.

See DEEDS, 1; HUSBAND AND WIFE.

PATENTS.

See CONTRACTS, 4; INJUNCTIONS, 1; MANDAMUS, 6; PUBLIC LANDS; SPECIES · PERFORMANCE, 3.

PAYMENT.

- PLEA OF PAYMENT IN AN AFFIRMATIVE DEFENSE, and must be supported by a preponderance of the evidence. *Perot v. Cooper*, 258.
- See AGENCY, 3; BANKS, 2, 3, 5, 6, 8, 9; CHECKS, 2; CORPORATIONS, 6-13; DEBTOR AND CREDITOR; JUDGMENTS, 23; LIMITATIONS OF ACTIONS, 1; MORTGAGES, 9, 10; NEGOTIABLE INSTRUMENTS, 3, 4, 9; SURETSHIP, 5; TRUSTS, 11; VENDOR AND PURCHASER, 7, 9.

PENALTIES.

See STATUTES, 6, 10.

PERSONAL PROPERTY.

- NATURAL GAS, WHEN BROUGHT TO THE SURFACE OF THE EARTH and placed in pipes for transportation, is property. *People's Gas Co. v. Tyner*, 433.
- See EMBODIMENT, 3; TAXES, 1-5; TRESPASS; TRIAL, 2.

PIERS.

See EMINENT DOMAIN, 2; WHEARVER.

PLEADING.

1. COMPLAINT WILL NOT BE HELD BAD because the facts stated do not entitle the plaintiff to all the relief prayed for. *Patoka Township v. Hopkins*, 417.
2. COMPLAINT IN ACTION ON SPECIAL CONTRACT NEED NOT ALLEGED DEFENDANT TO BE COMMON CARRIER. — In an action brought by a shipper of perishable property against a railroad company to recover damages for its failure to forward the property, where the complaint alleges that the defendant contracted with the plaintiff to ship, transport, and carry such property to its destination, it is not necessary that it should allege that the defendant was a common carrier. *Dunbar v. Port Royal etc. R'y Co.*, 860.
3. PLEA OF GENERAL ISSUE DOES NOT PUT IN ISSUE either the character in which plaintiff sues or the character or capacity in which the defendant is sued. *McNulta v. Lockridge*, 382.
4. DEMURRER, STATEMENT IN PLEADING NOT ADMITTED BY, WHEN. — When a statement in a pleading demurred to is a mere conclusion based upon another conclusion, and does not amount to an allegation of facts, its truth is not admitted by the demurrer. *Burlington etc. R'y Co. v. Dey*, 477.
5. OBJECTION TO, WHEN MUST BE MADE. — All technical or formal objections to a pleading must be raised by motion or demurrer before trial, and if not so raised, they are deemed to be waived. *Orman v. Mannix*, 340.
6. CHANCERY PRACTICE. — AN OPPORTUNITY TO ANSWER A CROSS-BILL must always be given the complainant, and he cannot be estopped from urging the denial of this right as a cause for the reversal of the decree, by showing that his bill, and the evidence offered to support it, were such that he could not have answered the cross-bill without contradicting them. *Metcalf v. Hart*, 122.
7. PLEADING ILLEGALITY OF CONSIDERATION. — If an answer contains allegations which, if true, show that a contract for the sale of land was founded upon an illegal consideration, this is a sufficient pleading of such illegality, though the answer complains of the non-performance of the contract. *Moffatt v. Bulson*, 192.
8. EQUITABLE DEFENSE NOT LOST BY FAILURE TO SET IT UP IN ANSWER WHEN. — A defendant does not lose his right to set up the defense of purchaser for a valuable consideration without notice, as against his co-defendant, by failing to plead it specially in his answer. *Norwood v. Norwood*, 875.
9. ADMISSION BY PLEA OF NOT GUILTY. — When, in an action against the receiver of a railway to recover for personal injury caused by the negligence of the servants of his predecessor in the same receivership, the declaration alleges that at the time of the accident such predecessor was receiver of such railway by appointment of a certain court, and as such was in possession of and operating the road; that the operators on the trains were the servants of such predecessor as receiver; that on a certain day such predecessor resigned his office as such receiver, and on the same day said court accepted the resignation and appointed the defendant as receiver to succeed his predecessor: that the defendant quali-

sed and entered upon his duties as such receiver and successor, — a plea of not guilty admits not only the representative character of the defendant when sued, but also the allegations of the declaration as to his predecessor and his own appointment as receiver. *McNulta v. Lockridge*, 362.

10. GENERAL DENIAL, WHEN THE COMPLAINT IS VERIFIED, and the answer also contains specific denials, raises no issue. *Delano v. Jacoby*, 291.

11. AMENDMENTS OF. — Power to allow amendments to pleadings is, in a large degree, in the discretion of the court, and should be liberally exercised, in the furtherance of justice; but when an application to amend is resisted, it should not be granted, except upon good cause shown, and upon such terms as the justice of the particular case may require. *Saint v. Guerrero*, 320.

See EQUITY, 1; INJUNCTIONS, 5, 6; NEGLIGENCE, 1; PARTIES, 2.

PLEDGE.

See NEGOTIABLE INSTRUMENTS, 7, 8.

POLICE POWER.

See MUNICIPAL CORPORATIONS, 4, 16, 17; STATUTES, 17; TAXES, 6.

POSSESSION.

See EJECTMENT, 1; EQUITY, 3; FRAUDULENT CONVEYANCES, 4; INSURANCE, 6; LICENSE, 2; MORTGAGES, 7, 8; NEGOTIABLE INSTRUMENTS, 3; PUBLIC LANDS, 2; REAL PROPERTY, 1, 2; TRIAL, 2; VENDOR AND PURCHASER, 7, 8.

POSTHUMOUS.

See INSURANCE, 10.

POWER OF ATTORNEY.

See AGENCY, 3-5.

POWERS.

EXECUTION OF — INTENTION. — When a donee of a power to sell land possesses also an interest in the subject of the power, a conveyance by him in his own name, without reference to the power, will be deemed an execution of it, if an intent to so execute it is made to appear. *McCreary v. Bomberger*, 760.

See TRUSTS, 6, 9.

PRESIDENTIAL ELECTORS.

See CONSTITUTIONS, 4-6; STATES, 1; STATUTES, 18-20.

PRESUMPTION.

See ELECTIONS, 3; INSURANCE, 1; JUDGMENTS, 4, 6; LIBEL, 7; MALICIOUS PROSECUTION, 3; MORTGAGES, 3; MUNICIPAL CORPORATIONS, 17; NEGLIGENCE, 6; NEGOTIABLE INSTRUMENTS, 1, 3; WILLS, 5.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP, 2.

PRIVATE WAYS.

See EMINENT DOMAIN, 4.

PRIVILEGED COMMUNICATIONS.

See ATTORNEY AND CLIENT, 2.

PROBABLE CAUSE.

See FALSE IMPRISONMENT; MALICIOUS PROSECUTION, 1, 4.

PROCESS.

1. JUDGMENT — MISTAKE IN RETURN OF SUMMONS, WHEN WILL NOT REVEAL. — When a summons issued March 2, 1888, is returnable March 10th thereafter, and the officer's return shows that the summons was served March 3, 1886, the mistake corrects itself, and cannot affect the validity of a judgment based upon such summons. *Evans v. Cabman*, 606.
 2. FALSE RETURN OF SHERIFF AVAILABLE IN DIRECT PROCEEDING TO SET ASIDE JUDGMENT. — A defendant against whom a judgment by default has been rendered upon a false return by the sheriff of service of summons upon him, and whose property has been sold under an execution issued upon such judgment, may assail such return in an action brought to set aside the judgment and sale, without proceeding directly against the officer for damages. *Johnson v. Gregory*, 907.
- See HUSBAND AND WIFE, 5; JUDGMENTS, 21, 23; TRESPASS TO TRY TITLE, 2.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROMOTERS.

See CONTRACTS, 2; CORPORATIONS, 2-5.

PROOFS OF LOSS.

See INSURANCE, 2-4.

PUBLICATION.

See JUDGMENTS, 1-4; LUREL; TRESPASS TO TRY TITLE, 2.

PUBLIC LANDS.

1. A PATENT FOR LANDS MAY BE SHOWN TO BE VOID, whether in a collateral proceeding or not, by proving that the land department had no jurisdiction to dispose of the land described in the patent. The person thus attacking the patent need not connect himself in any way with the original source of title. *Edwards v. Rolley*, 234.
2. A STATE PATENT TO LAND WHICH HAD AT ONE TIME BEEN THE BED OF A RIVER, and which the officers of the state had therefore no authority to sell or patent, is void, and may, on that ground, be successfully resisted by one in possession without title of any character. *Edwards v. Rolley*, 234.

2. A CONTRACT TO SELL AND CONVEY LANDS taken up under the homestead laws, made before final proof, is illegal and void. *Moffatt v. Bulsen*, 192.

See MANDAMUS, 6; SPECIFIC PERFORMANCE, 3.

PUBLIC POLIOY.

See OFFICERS, 1; REWARDS, 3; STATES, 2.

PUNISHMENT.

See ASSAULT, 2; CONTEMPT, 2, 3; CRIMINAL LAW, 3; DAMAGES, 2, 3; REWARDS, 1.

PURCHASE PRICE.

See VENDOR AND PURCHASER, 1, 2.

QUASI.

See MUNICIPAL CORPORATIONS, 14.

QUIETING TITLE.

See MORTGAGES, 11.

RAILROADS.

1. EMINENT DOMAIN — DAMAGES — ABUTTING OWNERS. — A lot-owner whose lot does not approach nearer to the line of a railroad than from one to two hundred feet, but who is within reach of the noise and dust produced by the ordinary operation of the road, is not entitled to recover damages for the consequential injury sustained by reason of such noise and dust. *Pennsylvania Co. v. Pennsylvania etc. R. R. Co.*, 762.
2. EMINENT DOMAIN — DAMAGES. — ONE WHO DOES NOT OWN LAND ABUTTING upon a street appropriated by a railroad in the exercise of the right to eminent domain is not entitled to recover damages on the ground that the street has been made inconvenient and dangerous to himself and other travelers. *Pennsylvania Co. v. Pennsylvania etc. R. R. Co.*, 762.
3. STREETS — OCCUPATION OF, BY RAILROAD — ADDITIONAL SERVITUDE. — The mere proximity of a railroad in the street may render adjoining dwelling-houses less desirable without imposing any liability on the railroad company for the loss sustained by their owners. Such proximity of the road, so that the noise of passing trains can be heard, or the dust and smoke therefrom be noticeable, imposes no additional servitude. *Jones v. Erie etc. R. R. Co.*, 722.
4. SERVITUDES — USE OF PROPERTY. — The use to which a railroad company puts its city property by building abutments thereon imposes no additional servitude on the property of an adjoining owner, although it may diminish its market value. *Jones v. Erie etc. R. R. Co.*, 722.
5. STREETS — OCCUPATION OF, BY RAILROAD — NEW SERVITUDE. — When the state authorizes the construction of a railroad upon a line which makes it necessary to cross one or more public highways or streets, the grant is subject to two limitations, — one in favor of the public for the preservation of the way; the other in favor of the land-owner, requiring no additional servitude to be imposed upon the land covered by the public easement without compensation. *Jones v. Erie etc. R. R. Co.*, 722.
6. STREETS — OCCUPATION BY RAILROAD — ADDITIONAL SERVITUDE. — The authorized construction of a railroad upon a public street, which injuri-

only affects the adjacent owner by interfering with the access to or drainage from his property, or the exclusion of light and air therefrom, imposes an additional servitude for which he may recover damages. *Jones v. Erie etc. R. R. Co.*, 722.

7. **STREETS — OCCUPATION OF, BY RAILROAD — ADDITIONAL SERVITUDE — DAMAGES.** — When a railroad company owns the diagonal corners on public streets, and is authorized by the city to connect them by an overhead bridge, which the company places on abutments twenty-three feet high, built upon its own land, the adjoining owner upon one of the remaining corners is entitled to recover damages for any additional servitude thus imposed upon his property, as for the exclusion of light and air therefrom, but he is not entitled to recover on the ground that his property is diminished in value by the use to which the railroad company puts its property; nor is he entitled to recover for the mere exposure of his property to the noise, smoke, dust, and danger from his horses or those of his visitors becoming frightened by moving trains. *Jones v. Erie etc. R. R. Co.*, 722.
8. **STREETS — OCCUPATION OF, BY RAILROAD — ADDITIONAL SERVITUDE.** — Mere exposure to danger of horses being frightened by passing trains twenty-three feet above the surface of the street is not an obstruction to access to adjoining property, nor the imposition of a new servitude for which the adjoining owner is entitled to recover. *Jones v. Erie etc. R. R. Co.*, 722.
9. **DEED OF RIGHT OF WAY — CONSTRUCTION.** — An absolute conveyance of a right of way from a land-owner and his wife to a railway company, reciting that it is given for and in consideration of the enhanced value to be given and contemplated to arise to the grantor's land and other property by the location and construction of the railroad, and for the consideration of full and complete value accruing in locating and maintaining a station on the land granted, is in no sense executory, and passes the title to the land entirely out of the grantors, and to the railway company. In such case the promises or obligations of the railway company referred to in the deed are in the nature of covenants, not conditions, and the grantors cannot reclaim the land on account of the non-performance of the covenants by the grantee, but can only sue for the damages arising from the breach of the contract. *Chicago etc. Ry Co. v. Titterton*, 39.
10. **RAILROAD CONDUCTOR — RIGHT OF PASSENGER TO RELY ON DIRECTION OF, IN BOARDING TRAIN.** — The conductor of a railroad train, in directing an intending passenger as to his method of getting upon the train, is acting within the scope of his authority as such conductor, and the passenger, in complying with his directions, is not guilty of negligence, unless he exposes himself to plain and apparent danger. *Irish v. Northern Pac. etc. R. R. Co.*, 399.
11. **CARRIERS — CONNECTING RAILWAYS — CONTRACT LIMITING LIABILITY.** — A connecting carrier by rail may, by contract, protect itself against liability for loss not occurring on its own line, whether the shipment is wholly within the state, or is interstate. *McCarn v. International etc. Ry Co.*, 51.
12. **CARRIERS — CONNECTING RAILWAY — CONTRACT LIMITING LIABILITY.** — A contract between a shipper and a connecting carrier by rail, stipulating that such carrier shall not be liable for anything beyond its own line, except to protect the through-rate of freight named, is valid, and will be enforced. *McCarn v. International etc. Ry Co.*, 51.

12. **CONNECTING CARRIERS — EXTENT OF THEIR LIABILITY UNDER CONTRACT TO FORWARD GOODS.** — Where a railroad company contracts to forward, not to transport, goods to a point beyond its own line, expressly stipulating that it assumes no liability beyond its own rails, it cannot be held liable in damages for any loss of or injury to such goods, occurring beyond its own line. *Dunbar v. Port Royal etc. R'y Co.*, 860.
14. **THROUGH JOINT RATES DEFINED.** — The "through joint rates" required by chapter 17 of the acts of the twenty-third general assembly of Iowa to be established are joint rates of charges for the transportation of freight and cars over a united route. They consist of the separate rates of each separate road, and cover all the charges for the transportation over two or more roads, as though they constituted one road, the rates fixed determining the whole charges. *Burlington etc. R'y Co. v. Dey*, 477.
15. **STATUTE PROVIDING FOR TRANSFER OF RAILROAD CARS NOT UNCONSTITUTIONAL.** — The custom of transferring cars from one railroad company to another, for the transportation of property over more than one railroad, without breaking bulk, has been practiced so long as to be recognized as of the course of business of which the courts will take judicial notice, and an act of the legislature providing that car-load lots of freight shall be transferred without unloading, unless done without charge to the shipper or receiver of such shipments, and making it the duty of the state railroad commissioners to aid the railroad companies in the matter by making and enforcing proper rules for the compensation of the companies for the use of the cars so transferred, and for their ultimate return, does not interfere with the constitutional guaranties for the protection of the rights and property of such companies. Such an enactment is a legitimate exercise of the legislative authority to regulate the performance of duty by carriers, and to prescribe reasonable charges for the transportation of freight. *Burlington etc. R'y Co. v. Dey*, 477.
16. **JOINT RATES FOR TRANSPORTATION OF FREIGHT, STATE HAS POWER TO ESTABLISH.** — A state which has power to fix the maximum charges for the transportation of freight by railroads, provided such charges shall not be unreasonable, has also authority and power to establish joint through rates, and an act of the legislature providing that all railway companies within the state shall, upon the demand of any person interested, establish joint through rates for the transportation of freight and cars between points on their respective lines within the state, and making it the duty of the board of state railroad commissioners, in case of a railroad company's failure to do so, to establish such joint through rates, is not unconstitutional. *Burlington etc. R'y Co. v. Dey*, 477.
17. **RAILROAD CORPORATION MAKING NO ATTEMPT TO PREVENT TRAVEL ACROSS ITS STATION-GROUNDS AND PLATFORM, AS A SHORT CUT BETWEEN PUBLIC STREETS, DOES NOT THEREBY INVITE THE USE OF SUCH STATION AND PLATFORM FOR THE PURPOSES OF SUCH TRAVEL.** *Redigan v. Boston etc. Railroad*, 520.
18. **RAILROAD CORPORATION LEAVING UNGUARDED AN OPENING MADE BY RAISING A TRAP-DOOR, FORMING PART OF A PLATFORM AT ONE OF ITS STATIONS, IS NOT ANSWERABLE TO ONE INJURED BY FALLING INTO SUCH OPENING WHILE CROSSING THE STATION AND PLATFORM WITHOUT THE INVITATION OF THE CORPORATION, IN ORDER TO MAKE A SHORT CUT BETWEEN PUBLIC STREETS, THOUGH HE AND OTHER PERSONS HAD BEEN IN THE HABIT OF SO CROSSING WITHOUT OBJECTION. THIS IS BECAUSE HE IS A MERE LICENSEE, TO WHOM THE CORPORATION OWES NO DUTY TO WARN HIM OF DANGER RESULTING FROM THE ORDINARY USE BY IT OF ITS PREMISES.** *Redigan v. Boston etc. Railroad*, 520.

100. **HIGHWAYS—RAILWAY CROSSINGS.** — IT IS THE DUTY OF A RAILWAY CORPORATION, upon building its railroad across a highway, to restore it as nearly as possible to its former condition, and failing to do so, it is liable for damages sustained on account of injuries received by reason of the unsafe condition in which the highway was left, provided the injured party used care commensurate with the apparent danger. *Louisville etc. R. R. Co. v. Pritchard*, 451.
101. **HIGHWAY CROSSINGS.** — A GIRL INJURED BY BEING THROWN OUT OF A VEHICLE at a point where a railway crossed a highway, because the highway had been left several inches below the railway track, is entitled to recover for such injury, though she was driving a team at the time, and it was moving from fright, if it was not unmanageable, and the accident would not have occurred had the highway crossing been put and kept in proper condition by the railway corporation. *Louisville etc. R. R. Co. v. Pritchard*, 451.
102. **MASTER AND SERVANT — RISKS ASSUMED BY AND CARE DUE TO SERVANT ENGAGED IN CONSTRUCTION OF RAILROAD.** — A railroad employee engaged in constructing the road assumes greater risks from a defective track than one passing over the road after its full completion and equipment, but the former has the right to expect a degree of care and skill from the company equal to that ordinarily exercised during the progress of railroad construction, and the company is not exonerated from liability for injuries inflicted on him, through a risk that must be regarded as extraordinary and unusual. *Colorado etc. R'y Co. v. Naylor*, 335.
103. **MASTER AND SERVANT — RISK NOT ASSUMED BY SERVANT.** — The single spiking of three ties and the entire failure to spike the fourth tie to the rails upon a curve in a railroad during the course of its construction is such negligence toward an employee engaged in such construction work, in exposing him to an extraordinary and unusual hazard not contemplated in his employment, as renders the company liable for injury resulting to him therefrom. *Colorado etc. R'y Co. v. Naylor*, 335.
104. **SECTION-FOREMAN AS VICE-PRINCIPAL.** — A railway section-foreman, having power to control, employ, and discharge the men under him, occupies the position of vice-principal as to them, in so far as they are affected by his acts. He is the representative of the railway company in the performance of any act, service, or duty in the line of his employment, and no distinction can be drawn between the performance of those higher duties intrusted to him specially, and those of an ordinary character, which both he and the subordinate servants under him are in the habit of indiscriminately performing. *Sweeney v. Gulf etc. R'y Co.*, 71.
105. **MASTER AND SERVANT — FOREMAN AS VICE-PRINCIPAL.** — A general foreman of men engaged in railroad construction, such men being subject to his immediate control, employment, and discharge, while he has control of the trains and appliances used in the work of construction, subject to the superintending direction of the general superintendent of construction when present, is a vice-principal during the absence of such superintendent, so as to make the company liable for his negligence toward one of the men under his control and direction. *Colorado etc. R'y Co. Naylor*, 335.
106. **LIABILITY FOR NEGLIGENCE OF VICE-PRINCIPAL.** — A railway section-foreman, having power to control, employ, and discharge the men under him, is a vice-principal, and not a fellow-servant with them, and the

railway company is liable for his negligent act in throwing back an open switch, whereby one of the men under his control is injured. *Sweeney v. Gulf etc. Ry Co.*, 71.

23. **STREET-RAILWAYS—TRANSFER TICKETS—LIMITATION AS TO TIME OF USING.**—A regulation that a transfer ticket from one line of street-railway to another will not be honored unless presented within fifteen minutes after its delivery to the passenger is not unreasonable, in the absence of any charter, ordinance, or contract obligation on the part of the company to make such transfer, and it is the duty of the passenger receiving such transfer ticket to read it, and, if possible, to use it within the time limited. If he fails to do so, the company cannot be held liable in damages for not honoring the transfer after the time marked upon it has expired, and for ejecting such passenger from the cars without physical injury upon his refusal to pay an additional fare. *Heffron v. Detroit etc. Ry Co.*, 601.
24. **STREET-RAILWAYS—TRANSFER TICKETS—LIMITATION AS TO TIME OF USING.**—When a passenger upon a street-railway receives a transfer ticket from one line of road to another, limited in its use to fifteen minutes from the time he receives it, and he takes the first car passing the point of transfer after receiving the ticket, he may recover of the company for being ejected from the car upon his refusal to pay a second fare, even though the time limit marked upon the transfer ticket has expired. *Heffron v. Detroit etc. Ry Co.*, 601.
25. **MUNICIPAL CORPORATION, RIGHT OF, TO IMPOSE RESTRICTIONS ON FRANCHISE OF STREET-RAILWAY COMPANY.**—Where a street-railway company is authorized by the statute under which it was built and operated to select and adopt a new method of propelling its cars, the municipal corporation, having the right to regulate the use of the streets over which the cars of the company run, has the power to impose such reasonable conditions upon the company's enjoyment of its franchises as in their judgment the interests of the public seem to require. Their authority in this respect is coincident in extent with the company's right of selection. *Hudson River Telephone Co. v. Waterliet Turnpike etc. Co.*, 838.
26. **ELECTRICITY AS MOTIVE POWER FOR STREET-CARS, AUTHORITY OF COMPANY TO ADOPT.**—Where a statute, enacted before the introduction of electricity as a propelling force, authorizes a corporation to construct a street-railroad, and to operate it by any mechanical or other power except steam, such company has authority, upon obtaining the consent of the proper municipal authorities, to adopt electricity as a motive power, and to place in the streets the apparatus and fixtures necessary for its practical and efficient use. Such statute is not to be limited to such methods of operating street-railroads as were known and in actual use at the time of its passage; for its language, literally construed, includes undiscovered as well as existing modes of operation. Nor is the company irrevocably bound by the choice of motive power first made by it after the enactment of the statute. *Hudson River Telephone Co. v. Waterliet Turnpike etc. Co.*, 838.
27. **STREET SURFACE RAILROAD ACT NOT APPLICABLE TO ROAD CHANGED FROM HORSE TO ELECTRIC MOTIVE POWER.**—A street-railway company having the right, under the statute authorizing it to build and operate its road, to change its motive power from horse-power to electricity is not subject to the provisions of the street surface railroad act, requiring the approval of the railroad commissioners and the consent of the

owners of one half in value of the property abutting on the streets, since it comes within the saving clause in that act, which declares that the act shall not interfere with, repeal, or invalidate any rights theretofore acquired, and inchoate as well as perfected rights are saved by that provision. *Hudson River Telephone Co. v. Waterlot Turnpike etc. Co.*, 523.

See CONSTITUTIONS, 3; CONTRACTS, 1; EMINENT DOMAIN, 2; FRAUD, 3; MASTER AND SERVANT, 20; NEGLIGENCE, 2; PLEADING, 2, 9; RECEIVERS; STATUTES, 10-12; TAXES, 2-5; TELEGRAPHS, 1; TELEPHONES, 3; TRIAL, 9; WITNESSES.

RATIFICATION.

See AGENCY, 3; CORPORATIONS, 3, 5; VENDOR AND PURCHASER.

REAL PROPERTY.

1. POSSESSION OF REAL ESTATE CONSTRUCTIVE NOTICE OF TITLE, WHEN. — Actual visible possession of real estate by a tenant is constructive notice of the title of the landlord. When, therefore, the person holding the legal title to a lot of land in trust for another person conveys the property while it is in the actual visible possession of a tenant of the beneficiary, the grantee takes with constructive notice of the right and title of the beneficiary, and of the contingent dower interest of his wife, and a person to whom such grantee mortgages the property, at the time of the conveyance, is affected with like notice. The mortgagor, not being an innocent purchaser without notice, but a purchaser with constructive notice of the dower interest, does not acquire that interest by the conveyance, and cannot convey by the mortgage what he does not own, and the mortgagee is not entitled to a foreclosure of the mortgage as against the dower interest. *Bowman v. Anderson*, 473.
2. POSSESSION OF LAND, TO CONSTITUTE NOTICE, MUST BE UNEQUIVOCAL. — Possession of land necessary to impart notice of title thereto must be adverse, exclusive, open, unequivocal, and notorious, and must be inconsistent with the claim of any other person. The possession of a farm by a woman claiming under an unrecorded deed from her son-in-law, who was, at the date of the conveyance, residing on the farm, and who continued to reside thereon after such date the same as before, exercising authority to some extent over the farm and the business of farming, and with whom the grantee resided as a member of his family, is not, therefore, sufficient to impart notice of title under the deed, even though the grantee generally managed the business of the farm, and sold the produce and stock raised thereon, it not appearing that she exercised exclusive control over it. *Elliot v. Lane*, 504.
3. CONSTITUTIONAL LAW. — RIGHT OF THE OWNER OF PROPERTY TO USE IT in the prosecution of a lawful and necessary business cannot be made to rest upon the caprice of the majority, or of any number, of those owning property surrounding that which he desires to use. *Ex parte Slog Lee*, 218.
4. SUBTERRANEAN MINES AND WATER. — LAND-OWNER'S RIGHT TO. — He who owns the surface of land may dig therein, and apply to his own purpose whatever he may there find between the surface and the center of the earth. If he thereby draws off water from the land of another, the latter is without redress by any action in the courts. *People's Gas Co. v. Tynes*, 433.

5. **NATURAL GAS BELONGS TO THE OWNER OF THE LAND**, and is a part of it so long as it remains in and upon such land and subject to his control, but if it escapes and goes into other land, and comes under another's control, the title of the former owner is gone. *People's Gas Co. v. Tyner*, 433.
6. **NATURAL GAS. — A LAND-OWNER HAS THE RIGHT TO INCREASE THE FLOW** of natural gas by "shooting" a well on his premises, though by so doing he will draw off and diminish the supply of natural gas in the lands of another. *People's Gas Co. v. Tyner*, 433.
7. **DAMAGES RESULTING FROM ACTS DONE ON ADJACENT LAND, LIABILITY FOR.** — One owner of land is not liable to his neighbor for damages resulting to the latter's land from acts done by the former upon his own land, unless the acts are negligently done, or the damages are the natural and probable consequences of such acts. He is not responsible for all possible consequences that may result from his lawful acts done on his own land. *Gregory v. Layton*, 857.
- See **ESTOPPEL**; **EXECUTORS AND ADMINISTRATORS**, 1; **FIXTURES**; **JUDGMENTS**, 8; **LIENSER**, 2, 7, 9; **PARTIES**, 1; **RAILROADS**, 1-9; **SPECIFIC PERFORMANCE**, 2, 3; **TRESPASS TO TRY TITLE**; **TRUSTS**, 1; **WATERS**, 1; **WITNESSES**, 3.

RECAPTION.

See **TRESPASS**.

RECEIPT.

See **SALES**, 2.

RECEIVERS.

1. **RECEIVER OF RAILWAY — LIABILITY OF, IN HIS OFFICIAL CAPACITY.** — A receiver of a railroad company, who is exercising the franchises of such company and operating its road, is, in his official capacity, amenable to the rules of liability applicable to the company when it is operating the road by virtue of the same franchises. For torts committed by his servants while operating the railroad under his management, he is responsible in such capacity, upon the principle of *respondent superior*. *McNulta v. Lockridge*, 362.
2. **RECEIVER OF RAILWAY APPOINTED BY A FEDERAL COURT — ACTION AGAINST, WHERE WILL LIE.** — An action at law can be maintained in a state court against a receiver of a railway appointed by a federal chancery court, for the torts of the servants of his predecessor in the same receivership. *McNulta v. Lockridge*, 362.
3. **RECEIVER OF RAILWAY — LIABILITY FOR ACTS OF PREDECESSOR.** — When liability of a railway receiver is incurred for the torts of his servants in operating the road, and after his resignation is accepted his successor is appointed by the federal court of chancery which appointed him, an action at law by the aggrieved party will lie in the state court against such successor in his representative capacity. *McNulta v. Lockridge*, 362.
4. **RECEIVER OF RAILWAY — ACTION AGAINST — JUDGMENT IN REM.** — A judgment against a receiver of a railroad company, as receiver, for a liability incurred by his predecessor in office, is not a personal judgment against the receiver, but is in the nature of a judgment *in rem* against the matters of the receivership or the fund and property which are the subjects of the trust. *McNulta v. Lockridge*, 362.
5. **RECEIVER OF RAILWAY — TORTS OF SERVANTS OF — LIABILITY OF RAILWAY COMPANY FOR.** — A railway company, having no control over the

receiver of its property or his servants, is not, in the absence of an absolute liability imposed by statute, responsible for the negligence or torts of the employees of the receiver in operating the road. *McNulta v. Lockridge*, 362.

- Q. RECEIVER OF RAILWAY — LIABILITY FOR TORTS OF SERVANTS.** — The liability of a railroad receiver for the torts of his servants in operating the road is a liability in his official capacity only. The damages for such torts cannot be recovered in suits against him personally, but may be recovered in suits in which he is named or designated as receiver, and paid out of the fund or property which the court appointing him has placed in his possession and under his control. *McNulta v. Lockridge*, 362.

See CORPORATIONS, 16; PLEADING, 9.

RECORDS.

AMENDMENT OF RECORD AS AFFECTING VESTED RIGHTS. — Rights already vested cannot be affected by an amendment of a record made subsequent to the time of their being vested, nor can such amendment of the record affect one not a party to the proceeding in which the amendment is allowed. *Wooters v. Joseph*, 355.

See DEEDS, 12; EXECUTION, 5; JUDGMENTS, 7; LES PENDENS, 1; MECHANIC'S LIEN, 6; MORTGAGES, 6; REGISTRATION.

RECOUPMENT.

See SURETYSHIP, 4.

REDEMPTION.

See DEEDS, 11; EXECUTION, 1; MORTGAGES, 9-11; TRUSTS, 10.

REGISTRATION.

See AGENCY, 5; ATTORNEY AND CLIENT, 2; DEEDS, 3, 6, 9, 10; ESTOPPEL; FRAUDULENT CONVEYANCES, 4.

REGULATIONS.

See WATERS, 15.

RELEASE.

See CORPORATIONS, 16; VENDOR AND PURCHASER, 2.

REMANDERMEN.

See INSURANCE, 5.

RENTS.

See EQUITTY, 1; LANDLORD AND TENANT; MORTGAGES, 7; MUNICIPAL CORPORATIONS, 19.

REPRESENTATIONS.

See FRAUD, 2.

REQUISITION.

See EXTRADITION, 1.

RESCISSION.

See FRAUD, 3; SURETYSHIP, 5; VENDOR AND PURCHASER, 6, 7.

RES GESTÆ.

See CORPORATIONS, 2.

RES JUDICATA.

See JUDGMENTS, 10-12.

RESPONDEAT SUPERIOR.

See MASTER AND SERVANT, 1.

RESTRAINT OF TRADE.

See CONTRACTS, 3-5.

RETURN.

See EXECUTION, 2, 3; JUDGMENTS, 21; PROCESS.

REVENUE.

See MUNICIPAL CORPORATIONS, 17.

REVERSAL.

See APPEAL, 5, 6, 8; OFFICERS, 2; PLEADING, 8; TRIAL, 10, 11.

REVIEW.

See STATUTES, 17.

REVIVOR.

See SURETYSHIP, 6.

REVOCATION.

See ATTORNEY AND CLIENT, 6; EQUITY, 3; LICENSER, 1, 6-9.

REWARDS.

1. WHEN EARNED — VIOLATION OF ELECTION LAWS. — A reward offered for the conviction of persons for offenses thereafter committed against election laws is earned by the prosecution of and a plea of guilty by one accused of such crime, although sentence is suspended and punishment is never imposed. *Wilmoth v. Hensel*, 738.
2. CONSIDERATION. — PAYMENT of a reward offered for the conviction of a person for an offense thereafter committed against election laws cannot be resisted on the ground of want of consideration, when a person accused of such crime has been prosecuted to a plea of guilty, in good faith. *Wilmoth v. Hensel*, 738.
3. PUBLIC POLICY. — An offer of reward for the conviction of persons for offenses thereafter committed against election laws is not void as against public policy. *Wilmoth v. Hensel*, 738.

RIGHT OF WAY.

See EJECTMENT, 1; FRAUD, 3; HUSBAND AND WIFE, 3; RAILROADS, 9; WATERS, 12.

RIPARIAN RIGHTS.

See **WATERS**, 4, 5.

ROBBERY.

See **EXTRADITION**, 1.

SALARY.

See **OFFICERS**, 2, 3

SALES.

1. **CONTRACT FOR, REQUIRES ARTICLES TO BE MERCHANTABLE.** — A contract for the sale and purchase of ice calls for a merchantable article of that name. *Murchie v. Cornell*, 526.
2. **SALE OF PART OF MASS—WHEN COMPLETE.** — When the subject of sale or exchange is part of a mass of the same kind, quality, and grade, as of part of the corn or wheat in an elevator, separation from the mass, or other specification of the particular part sold, is unnecessary to its appropriation, independent of the statute vesting the ownership in the holder of a warehouse receipt. *Oloke v. Shafroth*, 375.
3. **PROTEST MADE AND SWORN TO BY A PURCHASER OF ICE ON THE DAY OF ITS ARRIVAL IS NOT EVIDENCE THAT THE STATEMENTS THEREIN CONTAINED ARE TRUE, OR THAT THE SELLER HAD BEEN INFORMED OF ANY DEFECT IN THE ICE, OR FOR ANY OTHER PURPOSE, UNLESS IT BE TO SHOW THAT THE CLAIM THAT THE ICE WAS DEFECTIVE IN QUALITY WAS NOT AN AFTERTHOUGHT.** *Murchie v. Cornell*, 526.
- See **CONTRACTS**, 3-5; **GUARDIAN AND WARD**, 2; **INSURANCE**, 6; **INTERSTATE COMMERCE**; **NEGOTIABLE INSTRUMENTS**, 2; **TRUSTS**, 6-9; **VENDOR AND PURCHASER**; **WAREHOUSEMEN**.

SATISFACTION.

See **EXECUTION**, 3; **MORTGAGES**, 4, 5.

SEPARATE PROPERTY.

See **INSURANCE**, 8.

SEPULTURE.

See **EJECTMENT**, 2.

SEQUESTRATION.

See **CORPORATIONS**, 14

SERVICES.

CONTRACT FOR PERSONAL SERVICES IS TERMINATED BY THE INABILITY, FOR THE PERIOD OF SEVEN WEEKS, FROM SICKNESS OR DISEASE, OF THE PERSON WHO IS TO RENDER THE SERVICES TO PERFORM HIS DUTIES, AND ON HIS RECOVERING HIS HEALTH, HE IS NOT ENTITLED TO BE REINSTATED IN HIS EMPLOYMENT FOR THE BALANCE OF THE TERM. *Johnson v. Walker*, 550.

See **CORPORATIONS**, 4; **HUSBAND AND WIFE**, 4.

SERVITUDES.

See **RAILROADS**, 3-8.

SHERIFFS.

See ASSIGNMENT; JUDGMENTS, 21; PROCESS.

SHIPPING.

1. **OWNER OF VESSEL NOT LIABLE FOR WILLFUL ASSAULT OF CAPTAIN UPON SEAMAN.** — The owners of a vessel are not liable in damages for the willful and malicious act of their captain in assaulting and injuring a seaman while upon the high seas. Such an act is of a criminal nature, and cannot, therefore, be intended by the law to be within the scope of the employment of the captain, nor within the authority committed to him. *Gabrielson v. Waydell*, 793.
2. **MASTER AND SERVANT — CAPTAIN OF VESSEL AND SEAMEN FELLOW-SERVANTS.** — The captain of a vessel and the seamen are fellow-servants working together in the same undertaking and in a common service; and if, under the guise of exercising the authority conferred upon him, he willfully and maliciously does an injury to a seaman, the owners of the vessel will not be liable therefor. The captain's misconduct in such a case is one of the risks which the seaman assumes, in the absence of proof that the owners failed to select a proper and competent captain. *Gabrielson v. Waydell*, 793.

See WHARVES.

SLEEPING-CAR COMPANIES.

See TAXES, 5.

SOLICITOR.

See CORPORATIONS, 4.

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE CANNOT BE DECREED IF THE CONTRACT LEAVES SOME OF ITS TERMS open for future treaty, or to be afterwards settled.** *Metcalf v. Hart*, 122.
2. **UNCERTAINTY IN CONTRACT.** — A promise that when the promisor shall obtain title to a certain tract of land, he will, for a small or nominal consideration, convey to occupants who have made improvements, without specifying the character or value of the improvements to be made, or the amount to be paid, is too uncertain to sustain a decree for specific performance. *Metcalf v. Hart*, 122.
3. **CONTRACT MADE AS ADMINISTRATOR.** — A contract purporting to be made by J. W. H., administratrix of the estate and guardian of the minor children of V. K. H., covenanting with the people of the town of B. that she will, upon obtaining a patent from the United States for the land upon which the said town is situate, sell to parties in possession certain lands upon the terms specified, on condition that no further delay is caused or expense incurred on account of affidavits or protests which have been or may be filed in opposition to such patent, does not entitle a land-holder to maintain suit for specific performance against J. W. H. personally, she having succeeded to a part of the property as one of the heirs of V. K. H., because it is manifest from the contract that it was understood by the parties thereto that it would be performed by the promisor in her capacity of administratrix and guardian, and such performance was not possible. *Metcalf v. Hart*, 122.

See EQUITY, 1.

STATES.

1. **ELECTION OF PRESIDENTIAL ELECTORS.** — The abandonment, by a state, of an authorized method of choosing presidential electors, and the adoption and exclusive use for a great number of years of another authorized method, does not impair the power of the state to readopt the former method. It cannot, by nonuser, lose the power to exercise rights expressly delegated to it by the constitution of the United States. *McPherson v. Blacker*, 587.
2. **CONFLICT OF LAWS.** — A FOREIGN LAW, in cases other than penal actions, if not contrary to our public policy, or to abstract justice, or pure morals, or calculated to injure the state or its citizens, will be recognized and enforced here, if we have jurisdiction over the necessary parties, and can see that, consistently with our forms of procedure and law of trials, we can do substantial justice between the parties. *Higgins v. Central New England etc. R. R. Co.*, 544.
- See CONSTITUTIONS, 1; CREDITOR'S SUIT; EXTRADITION; GUARDIAN AND WARD; INTERSTATE COMMERCE; JURISDICTION; PUBLIC LANDS, 2; RAILROADS, 5, 16; STATUTES, 16; TAXES, 1-6; WHARVES.

STATUTE OF FRAUDS.

See CONTRACTS, 2

STATUTES.

1. **CONSTITUTIONAL LAW.** — SUBJECT OF AN ACT IS SUFFICIENTLY EXPRESSED in its title when it is to amend a pre-existing act, the title of which is recited *verbatim* in the title of such amendatory act, but without mentioning the year of its enactment. *Willis v. Mabon*, 626.
2. **STATUTES UPHOLD UNLESS PLAINLY UNCONSTITUTIONAL.** — Courts will uphold statutes unless they are so plainly and palpably in conflict with the constitution as to leave no doubt or hesitation in the judicial mind as to their invalidity. *Burlington etc. R'y Co. v. Dey*, 477.
3. **REMEDIAL STATUTE — HOW CONSTRUED.** — In construing a remedial statute, its language, so far as is consistent with a fair construction of the law, should be so interpreted as to promote and advance the remedy. *McNulta v. Lockridge*, 362.
4. **CONSTRUCTION OF STATUTE.** — Where one statute is amendatory of another, the two should be read together, and if one construction gives effect to the amendatory act, while another construction would defeat it, the former construction should be adopted. *Burlington etc. R'y Co. v. Dey*, 477.
5. **JUSTICE AND POLICY OF STATUTES NOT MATTERS OF JUDICIAL CONSIDERATION.** — The justice and policy of a statute are not matters for judicial consideration. They are for the consideration of the legislative department of the government alone. *Burlington etc. R'y Co. v. Dey*, 477.
6. **STATUTE NOT VOID FOR UNCERTAINTY WHEN.** — An amendatory act is not void for uncertainty in not defining offenses for which it imposes penalties, when the act which it amends explicitly defines such offenses. *Burlington etc. R'y Co. v. Dey*, 477.
7. **STATUTORY REMEDIES.** — Every statute made against an injury, mischief, or grievance impliedly gives a remedy for it; if no remedy is expressly given, the party has an action upon the statute. *Willis v. Mabon*, 626.
8. **CONSTITUTIONAL LAW.** — A STATUTE MAKING AN ARBITRARY CLASSIFICATION with respect to the subjects over which it operates, based upon no

reason suggested by a difference in their situation or circumstances disclosing the necessity or propriety of any different legislation in respect to them, is unconstitutional. *State v. Sheriff*, 650.

9. **CONSTITUTIONAL LAW — ARBITRARY DISCRIMINATIONS.** — A statute prohibiting the emission of dense smoke within a city, but providing that its provisions shall not be applicable to manufacturing establishments using the entire product of combustion, and the heat, power, and light produced thereby, within the building wherein the same are generated, or within a radius of three hundred feet therefrom, makes an arbitrary distinction between different classes of business, and is therefore void. *State v. Sheriff*, 650.
10. **ATTORNEY'S FEES, RECOVERY OF, MAY BE PERMITTED IN ONE CLASS OF CASES AND DENIED IN OTHERS.** — The legislature may prescribe rules permitting the recovery of attorney's fees in one class of cases and deny it in all others. A statute which permits the plaintiff, in an action against a railroad company for a violation of its provisions, to recover, in addition to the damages therein provided for, an attorney's fee, confers no special privilege prohibited by the constitution, nor can it be regarded as imposing a penalty for exercising the right of defense. *Burlington etc. Ry Co. v. Dey*, 477.
11. **DUE PROCESS OF LAW, PROVIDED BY ACT AUTHORIZING ESTABLISHMENT OF JOINT RATES OF TRANSPORTATION.** — A statute conferring upon a state board of railroad commissioners authority to establish joint through rates for the transportation of freight, after notice to the railroad companies to be affected thereby, and an opportunity to be heard, does not operate to deprive such railroad companies of their property without due process of law. Special proceedings applicable to specified subject-matter, and conformable to the rules requiring notice and the acquisition of jurisdiction, and which affect all persons alike whose property or rights come within the lawful scope of the proceedings, are prosecuted with due process of law. *Burlington etc. Ry Co. v. Dey*, 477.
12. **RULES OF EVIDENCE — POWER OF STATE TO PRESCRIBE, IN ALL PROCEEDINGS.** — A statute authorizing railroad commissioners to establish joint rates of transportation which shall be regarded as *prima facie* reasonable does not confer upon such commissioners judicial functions, but simply prescribes a rule of evidence. It does not prevent the companies from having the acts of the commissioners in fixing rates of charges reviewed in the courts of the state. *Burlington etc. Ry Co. v. Dey*, 477.
13. **CONSTITUTIONAL LAW — EX POST FACTO LAWS.** — A statute changing the number of the grand jury in all cases, and authorizing a prosecution by information as well as by indictment, does not alter the situation of an accused to his disadvantage, and therefore is applicable to the prosecution of a crime alleged to have been committed before its passage, if the constitution of the state, adopted before the doing of the criminal act, declared that the legislature may change, regulate, or abolish the grand jury system, and that, until otherwise provided for by law, no person shall, for a felony, be proceeded against criminally otherwise than by indictment. *In re Wright*, 94.
14. **CONSTITUTIONAL LAW — STATUTE INVALID IN PART.** — The unconstitutionality of one portion of a statute cannot defeat other portions, unless the nature of the unconstitutional provision is such as to render it of vital importance to the whole statute. *McPherson v. Blacker*, 587.

- 15. CONSTITUTIONAL LAW. — STATUTE DECLARING THAT NO EMPLOYER SHALL IMPOSE** a fine or withhold the wages, or any part of the wages, of an employee engaged in weaving, for an imperfection that may arise during the process of weaving, is void, because it conflicts with that part of the state constitution enumerating as one of the inalienable rights of man that "of acquiring, possessing, and protecting property." *Commonwealth v. Perry*, 533.
- 16. CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT. —** A statute of a state denying the right to appoint as trustee any person who is not a resident of the state is invalid, at least as against citizens of other states, because it impairs their privileges and immunities, as granted under article 4, section 2, and the fourteenth amendment, of the constitution of the United States. *Roby v. Smith*, 439.
- 17. POLICE POWER — LICENSE TAX. —** What business or occupation so far affects the public welfare and good order as to require to be licensed is a matter of legislative consideration and control, which, when exercised in good faith, cannot be reviewed by the courts. *Oil City v. Oil City Trust Co.*, 770.
- 18. ELECTION OF PRESIDENTIAL ELECTORS. —** An act entitled "An act to provide for the election of electors of President and Vice-President of the United States," the body of which provides for the election of alternate electors as well as electors, is not in conflict with that provision of the state constitution declaring that no law shall embrace more than one subject, which shall be expressed in its title. It merely provides for filling vacancies caused by the death or disability of the electors. Nor is it invalid for failing to expressly provide for filling a vacancy in case it may occur by the death or disability of both the elector or the alternate; nor because it fails to require notice of the election of district electors provided for, as they are to be chosen at a general election, and the general election law provides that notice shall be given that presidential electors will be chosen at such general election. *McPherson v. Blacker*, 587.
- 19. ELECTION OF PRESIDENTIAL ELECTORS. —** A statute providing for the election of presidential electors by districts, and also providing that the counting, canvassing, and certifying of the votes cast for such electors at large, and for district electors, "shall be done as near as may be as is now provided by law," is not invalid and inoperative on the ground that it fails to provide means for canvassing the votes for such electors in the portions of a certain county which constitute the first, and portions of the second, sixth, and seventh electoral districts, since such districts are defined by law, and the canvass of the votes cast therein is provided for by the general election law. *McPherson v. Blacker*, 587.
- 20. ELECTION OF PRESIDENTIAL ELECTORS. —** The fact that a state statute providing for the method of choosing presidential electors is in conflict with an act of Congress, in so far as it fixes a date for the meeting of the electors and the method of certifying their action, does not render the remaining provisions of the act inoperative or unconstitutional. *McPherson v. Blacker*, 587.
- See CONSTITUTIONS, 3, 4, 5; CONTRACTS, 3; CORPORATIONS, 13, 14, 16; COUNTIES; CREDITOR'S SUIT; CRIMINAL LAW, 1; DEEDS, 6; ELECTIONS, 1; EMINENT DOMAIN, 2; HABEAS CORPUS; HUSBAND AND WIFE, 2; IN-**

JUNCTIONS, 3; JUDGMENTS 17, 22; MANDAMUS, 4; MUNICIPAL CORPORATIONS, 14; NOTICE, 2, 3; OFFICERS, 2; RAILROADS, 14, 16, 23, 30; RECEIVERS, 5; SALES, 2; TAXES, 3, 6-8; TELEPHONES; VENDOR AND PURCHASER, 5; WILLS, 10.

STEAMSHIP COMPANIES.

See WHARVES.

STOCK.

See CONSTITUTIONS, 9; CORPORATIONS, 7-15, 17; EXECUTORS AND ADMINISTRATORS, 3; WATERS, 15, 17.

STOCKHOLDERS.

See CONSTITUTIONS, 9, CORPORATIONS; LIMIT, 6; WATERS, 12.

STORAGE.

See WAREHOUSEMEN.

STREET-RAILWAYS.

See RAILROADS, 26-30; TELEPHONES, 3.

STREETS.

See EMINENT DOMAIN, 4; MUNICIPAL CORPORATIONS, 6-13, 15; RAILROADS, 2-3; 17, 18, 23-30; TELEPHONES, 2, 3; WITNESSES.

SUFFRAGE.

See ELECTIONS, 1.

SUMMONS.

See JUDGMENTS, 23; PROCESS.

SUPERINTENDENT.

See RAILROADS, 24.

SURETYSHIP.

1. WHAT CREATES. — A bond with warrant of attorney to confess judgment, given to secure payment of judgments assigned to the obligee, and expressly providing that it is to remain in force until the whole sum is paid, creates a contract of suretyship on the part of the obligor, and does not constitute him a mere guarantor. *Campbell v. Sherman*, 735.
2. SURETY AND GUARANTOR — DIFFERENCE BETWEEN. — A contract of suretyship creates a direct liability to the creditor for the act to be performed by the debtor, but a contract of guaranty creates a liability only for his ability to perform such act. A surety is an insurer of the debt, while a guarantor is only an insurer of the solvency of the debtor. *Campbell v. Sherman*, 735.
3. A SURETY MAY ASSERT THE DEFENSE OF FAILURE OF CONSIDERATION, though the principal is not a party to the action. *Stockton Soc. etc. Society v. Giddings*, 181.
4. SURETY CANNOT PRESENT, BY WAY OF RECOURSE, a defense consisting of a claim for damages resulting from a breach of warranty contained in

a contract made with his principal. The latter alone can assert this claim. *Stockton Sav. etc. Society v. Giddings*, 181.

8. SURETY IS ENTITLED TO PROVE, AS A DEFENSE, that the obligation upon which he is sued was given in payment for property purchased by his principal, and that the latter has rescinded the purchase on some ground authorizing such rescission. *Stockton Sav. etc. Society v. Giddings*, 181.
9. FAILURE OF CREDITOR TO REVIVE JUDGMENT does not release a surety, in the absence of an express agreement that such judgment should be kept revived for his benefit. *Campbell v. Sherman*, 735.

See BANKER, 1; CORPORATIONS, 16; GUARANTY, 1.

SURFACE WATERS.

See MUNICIPAL CORPORATIONS, 7; WATERS, 1-3.

SYNDICATE.

See ESTOPPEL; TRUSTS, 1; VENDOR AND PURCHASER, 3.

TAX DEEDS.

See TAXES, 7, 8.

TAXES.

1. PERSONALTY, WHERE MAY BE TAXED. — A state has a right to tax all personal property found within its jurisdiction, without regard to the place of the owner's domicile. *Denver etc. R'y Co. v. Church*, 252.
2. TAXATION OF RAILWAY CARS ENGAGED IN INTERSTATE COMMERCE. — A state has the right to tax railway cars found within its boundaries, although they are engaged in interstate commerce, and, though used, are not owned by the company to which they are assessed. *Denver etc. R'y Co. v. Church*, 252.
3. ALL ROLLING STOCK owned, used, or operated by a domestic railway company is, by the Colorado statutes, placed upon the same footing with reference to state taxation, regardless of the interest, as lessee or owner, of the company operating it. It is not exempt from taxation merely because, in performing its regular journeys, it sometimes passes out of the state and becomes temporarily useful in operating other railroads. *Denver etc. R'y Co. v. Church*, 252.
4. TAXATION OF RAILWAY PERSONALTY. — Such personal property as is owned or controlled by a railway company, but is not used in the direct operation of its road within the state, cannot be taxed for state purposes, though such property may be so employed as to indirectly aid in carrying on the business. *Denver etc. R'y Co. v. Church*, 252.
5. PULLMAN SLEEPING-CARS controlled and operated by a domestic railway company, though owned by a foreign corporation, may be assessed to the domestic corporation for state taxes when found within the borders of the state, although they are employed one third of the time outside the state in the transaction of business. *Denver etc. R'y Co. v. Church*, 252.
6. POLICE POWER — LICENSE TAX ON BANKS — CONFLICT OF STATUTES. — A statute exempting banks from taxation on payment of a state tax does not exempt them from the power of cities to impose a license fee or occupation tax as incidental to the exercise of the police power under

another statute expressly authorizing the imposition of such license tax. *Oil City v. Oil City Trust Co.*, 770.

7. **TAX SALES — NOTICE TO REDEEM, NECESSITY OF EXTRINSIC PROOF OF.** — If a statute providing for the collection of taxes declares that a tax deed shall be *prima facie* evidence of certain designated facts, and conclusive evidence of all others, is, some years after its enactment, amended so as to require the purchaser to give notice of the expiration of the time for redemption, and that no deed shall be issued unless an affidavit, showing the giving of such notice, has been filed with the officer who made the sale, a deed by such officer is neither conclusive nor *prima facie* evidence that such notice was given or affidavit filed, and must be disregarded, unless the person claiming under it proves that the affidavit was filed, for, until filed, the officer is without authority to execute a conveyance. *Miller v. Miller*, 229.
8. **A TAX DEED CREATES NO PRESUMPTION** that the facts upon which it is based, or which are recited therein, had any existence, in the absence of a statute providing the effect which shall be given it in evidence. *Miller v. Miller*, 229.

See MUNICIPAL CORPORATIONS, 18, 19.

TELEGRAPHS.

1. **LIABILITY OF CONNECTING LINES.** — The analogy of connecting telegraph lines to connecting railways is so great that the established rules of law which determine the liability of the latter should be applied with equal force to the former. *Smith v. Western Union Tel. Co.*, 59.
- LIABILITY OF CONNECTING LINES.** — When a telegraph company receives a dispatch for transmission from a connecting telegraph line, it is bound to exercise due diligence in transmitting and delivering the message, or respond in damages to the party injured by its failure to do so, and this without regard to the contract between the sender and the company first receiving the message as to its own liability. In such case the telegraph company inflicting the injury by its own act of negligence is liable for the damages caused thereby. *Smith v. Western Union Tel. Co.*, 59.

TELEPHONES.

1. **TELEPHONE, TRANSMISSION OF MESSAGES BY, AUTHORIZED BY STATUTE FOR INCORPORATION OF TELEGRAPH COMPANY.** — The form of transmitting messages by telephone, through the medium of an electric current passing over extended wires, is authorized by a statute for the incorporation of telegraph companies, although when the act was passed such form of communication was unknown. *Hudson River Telephone Co. v. Watervliet Turnpike etc. Co.*, 838.
2. **RIGHT OF PASSAGE THROUGH STREETS, FORM IN WHICH SHALL BE ENJOYED CANNOT BE QUESTIONED WHEN.** — Where a telephone company has, by the manner in which it has elected to use its franchise, accorded to the public the unrestricted right of passage through the public streets, it cannot question the form in which such right shall be enjoyed, so long as it is of lawful origin and is utilized with proper care and skill. *Hudson River Telephone Co. v. Watervliet Turnpike etc. Co.*, 838.
3. **TELEPHONE COMPANY NOT ENTITLED TO RESTRAIN STREET-RAILWAY COMPANY FROM PROPELLING CARS BY ELECTRICITY.** — A telephone company operating its lines under a franchise granted and accepted upon the express condition that the maintenance of its lines shall not prevent

the adoption of any safe, convenient, and expeditious mode of travel is not entitled to an injunction to restrain a street-railway company from operating its road by the single-trolley system of electrical propulsion, a system found to be the best yet devised, and neither prejudicial to public health nor dangerous to human life, since the former company is not using the streets for any of the purposes to which they have been dedicated as public highways, while the latter company is occupying them in such a manner as to expedite public travel and promote the public use to which they were originally devoted. *Hudson River Telephone Co. v. Watervliet Turnpike etc. Co.*, 838.

THEFT.

See LARCENY; LIBEL, 1.

TORT-FRASORS.

See LIBEL, 2.

TORTS.

See ASSIGNMENT; CORPORATIONS, 8; RECEIVERS, 1-3, 5, 6.

TOWNSHIPS.

WATERS, 2.

TRANSCRIPT.

See EXECUTION, 1, 4.

TRANSFERS.

See RAILROADS, 26, 27.

TREATY.

See EXTRADITION, 1.

TRESPASS.

OWNER OF PERSONALTY MAY RECAPTURE and take it into his own possession whenever and wherever he may peaceably do so, and in so doing he will not be guilty of a trespass. *Stuyvesant v. Wilcox*, 580.

See JURISDICTION; LICENSER, 2.

TRESPASS TO TRY TITLE.

1. The remedy of trespass to try title is broad enough to embrace every character of litigation affecting title to real estate. *Hardy v. Beatty*, 80.
2. JUDGMENT IN REM — CONSTRUCTIVE SERVICE UPON NON-RESIDENT MINOR. — An action of trespass to try title to an undivided interest in a tract of land is a proceeding *in rem*, and a judgment therein rendered upon service by publication upon a non-resident minor heir is effective to fix the title to the land as between the parties to the action. *Hardy v. Beatty*, 80.

TRIAL.

1. SEPARATE TRIAL FOR SEVERAL DEFENDANTS properly joined in a civil action cannot be claimed as matter of right, and may be refused in the discretion of the court. *Saint v. Guerrerio*, 320.

2. **ASSAULT — EVIDENCE OF OWNERSHIP OF PERSONALTY.** — When, in an action to recover damages for an assault and battery, it appears that plaintiff had conveyed his farm to defendant in consideration of life support from the latter, and after leaving the farm had returned to get certain personal property claimed by him to be his, but also claimed by defendant to have passed to him under the arrangement between them, and the evidence also shows that the alleged assault originated in the plaintiff's attempt to remove such property after gaining peaceable possession of it, evidence is admissible to show the whole arrangement between the parties, and that title to such personalty never passed to defendant. *Stuyvesant v. Wilcox*, 580.
3. **JURY IN EQUITY CASES — SUBMITTING QUESTIONS TO.** — The right to have certain questions of fact passed upon by the jury in a civil action of equitable cognizance is a matter in the sound discretion of the court. The privilege cannot be insisted upon *ad libitum*, and the number and character of the questions should be controlled within reasonable limits. *Saint v. Guerrero*, 320.
4. **LEADING QUESTIONS, WHEN PERMISSIBLE.** — When, in an action on a policy of insurance, the insured testifies generally as to the goods on hand at the time of the fire, it is not improper to allow leading questions to be asked him, for the purpose of directing his attention to particular items in stock. *Graves v. Merchants' etc. Ins. Co.*, 507.
5. **VIEW OF PREMISES BY JURY — ALLOWING OR REFUSING, IN DISCRETION OF COURT.** — In an action to recover damages resulting from the alleged negligence of the defendant, it is a matter within the discretion of the court to grant or refuse a view by the jury of the premises where the injury occurred. *Klepech v. Donald*, 936.
6. **JURY — RIGHT TO VIEW PREMISES.** — It is within the discretion of the trial court to grant or refuse a request to have the jury view the premises or property in litigation in a civil action of equitable cognizance. *Saint v. Guerrero*, 320.
7. **CONSTITUTIONAL LAW — CHARGE ON FACTS, WHAT IS NOT.** — A judge does not charge on the facts, within the meaning of the constitutional inhibition, when he states to the jury only the points of evidence as to which there is no dispute, and leaves wholly to them the only disputed question of fact in the case, without the slightest intimation of his opinion as to that question. *State v. Jackson*, 890.
8. **CHARGING JURY UPON MATTERS OF FACT, WHAT IS NOT.** — An instruction to the jury that they may consider the relations of the parties and witnesses, and their interest, temper, bias, demeanor, intelligence, and credibility in testifying, is not a violation of the constitutional provision prohibiting judges from charging juries with respect to matters of fact, or commenting thereon. *Klepech v. Donald*, 936.
9. **INSTRUCTIONS — MEANING OF WORDS "AT THE TIME."** — In an action to recover for the death of a person killed while attempting to cross a railroad track, an instruction submitting to the jury the question of his due care "at the time" of the accident is not erroneous as limiting the inquiry to the precise moment of collision. The words "at the time" as used in the instruction refer to the whole transaction, including due care in looking and listening before attempting to cross the track, when evidence on this point is before the jury. *McNulta v. Lockridge*, 362.
10. **INSTRUCTIONS — FAILURE TO NUMBER NOT ERROR.** — When the instructions given are correct as matter of law, failure of counsel asking them

to either number or sign them furnishes no ground for reversal. *Orman v. Mannix*, 340.

11. INSTRUCTIONS IN CRIMINAL CASES. — A charge to the jurors, in a criminal case, telling them that they must believe the defendant guilty of the crime charged, beyond a reasonable doubt, in order to convict, but omitting to tell them that their belief must be founded upon "all the evidence," is objectionable, but will not work a reversal of the verdict, in the absence of proof that the charge, as a whole, is not so clear in this respect as to mislead intelligent men. *Gorman v. People*, 350.
12. COMPROMISE VERDICT — INSTRUCTION TO JURY CONCERNING. — To charge a jury, that "the law which requires unanimity on the part of a jury to render a verdict expects and will tolerate reasonable compromise and fair concession," is erroneous. While the law permits each juror to give due consideration to the arguments of his fellow-jurors, it does not expect nor tolerate his agreeing upon a verdict unless he is convinced that it is right. *Richardson v. Coleman*, 429.

See APPEAL; EQUITY, 2.

TRUST DEEDS.

See TRUSTS, 5, 10-12.

TRUST FUND.

See CORPORATIONS, 6, 7.

TRUSTS.

1. EQUITABLE TITLE TO LAND IS IN PARTY WHO PAYS ACTUAL PURCHASE PRICE WHEN. — Where one member of a syndicate purchases land for the syndicate, and falsely represents to the other members thereof that the purchase price is more than it actually is, and that he is paying for a proportionate interest in the land, while in fact the other members of the syndicate pay the whole price, the equitable title to the land is in the parties who have paid the actual purchase price. *Shoups v. Griffiths*, 910.
2. WILL CREATING TRUST WITHOUT NAMING BENEFICIARY. — A trust created by will, without anywhere referring to or designating the beneficiaries for whom the trust is intended, is inoperative and void. *Heidenheimer v. Bauman*, 29.
3. WILLS. — TRUSTS NOT SUFFICIENTLY DECLARED on the face of a will, or by a writing identified as a part of it, cannot be set up by extrinsic evidence to defeat the rights of the testator's heirs at law, or next of kin. *Heidenheimer v. Bauman*, 29.
4. WILLS — CERTAINTY OF DEVISE — EXTRANEOUS WRITING TO AID. — A will, on its face, or by reference to some writing existing at the time when the will is executed, and so referred to and identified as to become a part of it, must declare not only what enumerated bequests and devises shall be, but also who shall take them, directly, or beneficially through a trustee, and an extraneous writing not so identified is inadmissible to aid a trust created by will without naming a beneficiary. *Heidenheimer v. Bauman*, 29.
5. TRUSTEES — RIGHT TO SELL AND CONVEY. — A trustee under a trust deed or mortgage containing a power of sale is vested with authority, so long as he retains the legal title, to convey the equitable title of the trustor or

mortgagor, upon default of the mortgage debt, and upon proper advertisement and sale. *Stephens v. Clay*, 328.

6. **TRUSTEES—IRREGULAR SALE AND CONVEYANCE BY—EQUITABLE RELIEF.**—When a trustee has sold and conveyed the trust property without complying with the conditions of the trust, a court of equity will enjoin the sale, either by a regular foreclosure and sale, or by a decree requiring the trustee to execute the power in accordance with the terms of the trust, or by appointing a new trustee, and devolving upon him the execution of such power. *Stephens v. Clay*, 328.
7. **TRUSTEES—IRREGULAR SALE AND CONVEYANCE BY—EFFECT OF.**—A trustee may divest himself of the legal title without compliance with the conditions of the trust, but a sale and deed, except in strict compliance with such conditions, is of no effect whatever, so far as the trustor's equitable estate is concerned, and if the trustee, in disobedience of the trust conditions, by deed transfers the legal title, his grantee takes only the trustee's interest. *Stephens v. Clay*, 328.
8. **TRUSTEES' SALES—SECOND CONVEYANCE BY TRUSTEE—EFFECT OF.**—When a trustee has sold and conveyed the trust property without complying with the terms of the trust, the power of sale is extinguished, so far as he is concerned; and an effort on his part to exercise the power originally vested in him, by an attempted resale or second deed, in compliance with the conditions of the trust, is absolutely void. *Stephens v. Clay*, 328.
9. **TRUSTEES' SALES—CAVEAT EMPTOR.**—The rule of *caveat emptor* applies to trustees' sales, and the purchaser, whether the mortgagee or a stranger, is, in proceedings by a party injured, conclusively charged with notice of irregularities by the trustee in executing the power of sale. *Stephens v. Clay*, 328.
10. **TRUST DEEDS GIVEN AS SECURITY, AND MORTGAGES** containing a power of sale, vest the legal title in the trustee, while the equity of redemption or equitable title remains in the mortgagor or trustor. *Stephens v. Clay*, 328.
11. **TRUST DEED, NOTICE OF CONDITIONS OF.**—One who purchases a bond with interest coupons attached, which bond recites that its payment and the payment of the interest thereon are secured by a mortgage or a deed of trust to a specified trust company, and that it shall not be obligatory until certified by such company, is not put upon inquiry by the recitals in the bond, and thereby charged with notice that by the terms of the trust deed no action at law or in equity can be maintained until after a requisition has been made upon the trustees, signed by holders of not less than one fourth in amount of the bonds secured by such deed, and he has unreasonably refused to act thereon, and therefore the holder of any of such bonds, or any coupons thereon, is entitled to bring an action to enforce their payment without resorting to the remedies specified in the deed. *Gulford v. Minneapolis etc. Ry Co.*, 694.
12. **TRUST DEED, WHEN BOND-HOLDERS MUST TAKE NOTICE OF.**—If a bond merely refers to the fact that it is one of a series of bonds, all of which are secured by a trust deed, and that it is not obligatory unless certified by the trustees named in such deed, such recital is too general to charge *bona fide* purchasers of bonds with notice that by the terms of the deed of trust they are not entitled to maintain an action upon their bonds until after the holders of one fourth in amount of all the bonds secured by the deed have made a requisition on the trustees to take proceedings

for their collection, and he has unreasonably refused so to do. *Gulford v. Minneapolis etc. Ry Co.*, 694.

See BEQUESTS; CREDITOR'S SUIT; DEEDS, 10; DEVISE; ESTOPPEL; FRAUDULENT CONVEYANCES, 2; INSURANCE, 5; REAL PROPERTY, 1; RESCISSION, 4; STATUTES, 16; VENDOR AND PURCHASER, 4.

ULTRA VIRES.

See CORPORATIONS, 1, 12.

UNDUE INFLUENCE.

See WILLS, 1-6.

VARIANCE.

See EVIDENCE, 4; INSURANCE, 10.

VENDOR AND PURCHASER.

1. **THOUGH A CONTRACT OF SALE WAS SIGNED BY THE VENDOR ONLY, and he, for that reason, could not have maintained an action for the balance of the purchase price, yet he may be compelled to accept such balance, and thereupon to make a conveyance, and therefore such part of the purchase price as has been paid is not without consideration, and cannot be recovered by the vendee.** *Bradford v. Parkhurst*, 189.
2. **JUDGMENTS — BONA FIDE PURCHASER UNDER.** — A judgment creditor who levies upon land and then takes a deed therefor from his judgment debtor, crediting the price of the land upon the judgment, but not releasing the lien of his levy, is not a *bona fide* purchaser, but takes only such title to the land as is possessed by the judgment debtor, and therefore subject to any prior conveyance thereof made by him. *Bonner v. Grigsby*, 48.
3. **BONA FIDE PURCHASER, DOCTRINE OF, APPLICABLE TO PURCHASER OF LEGAL TITLE ONLY.** — The doctrine which protects a *bona fide* purchaser without notice is applicable solely to purchasers of a legal title; the purchaser of an equitable interest purchases at his peril, and acquires the property burdened with every prior equity charged upon it. Where, therefore, a party, having, at most, an equitable estate in lands the legal title to which is in a trustee for a syndicate, mortgages such lands, the mortgage is void. *Shouse v. Griffiths*, 910.
4. **TRUSTEE, PURCHASER FROM.** — If a conveyance is made by one who, in an action begun after it was executed, is adjudged to have held the property in trust, the grantee is not bound to assume the burden of proving that he was a purchaser in good faith and for a valuable consideration, in a contest with the holder of title acquired under the judgment in such action. The grantee not being a party to the action, it could not affect him, nor establish against him that his grantor held the property in trust. *Warnock v. Harlow*, 209.
5. **ENTIRE CONTRACT ILLEGAL IN PART.** — If an oral agreement is made for the sale of land, one part of which the vendor had filed upon under the desert-land act, while to the residue he had a perfect title, and such agreement is afterwards consummated by a conveyance of the land to which the title was perfect, and the delivery of possession of the whole tract, and a further agreement is made that as soon as title can be procured for the other tracts they will also be conveyed, and a note and

mortgage are given for the balance due, the contract is entire, and, being partly founded upon an illegal agreement for the conveyance of the lands to be acquired, is, by the code of California, wholly void, and the note and mortgage cannot be enforced, though the mortgagee, after their execution, acquired title to the whole property. *Moffatt v. Bulson*, 192.

6. **FAILURE OF THE VENDOR TO TENDER A CONVEYANCE** when the purchase price became due, or according to the terms of the contract of sale, does not show that there has been a mutual abandonment and rescission of the contract. *Bradford v. Parkhurst*, 189.
7. **RESCISSIOM. — IF A VENDOR INDUCES THE PURCHASE OF REAL PROPERTY BY REPRESENTING** that he will do certain acts, and discontinues these acts, but the vendees remain in possession of the property, and make further payments thereon, ask extensions of time in which to make other payments, it is too late for them to rescind their contract of purchase, *Delano v. Jacoby*, 201.
8. **RIGHT OF FORMER TO RATIFY TRANSFER. — A vendee cannot escape from the obligation to pay notes given by him for the purchase price of real property on the ground that the conveyance to him was made by a person acting for the vendor without previous authority, if the vendor, after knowledge of such conveyance, ratifies it, and the vendee has taken and held possession for several years under the conveyance to him, which he claims was not authorized.** *Delano v. Jacoby*, 201.
9. **VENDEE CANNOT, AT HIS ELECTION, ABANDON HIS CONTRACT OF PURCHASE, signed by the vendor alone, and recover moneys paid thereon, though the contract declared that if the balance of the purchase price were not paid by a day designated, it should become null and void, and all payments made thereon should be forfeited, and the vendor did not tender a conveyance, nor make a demand for payment, until after that day passed.** *Bradford v. Parkhurst*, 189.

See DEEDS; LIEN, 3; MECHANIC'S LIEN, 4; PLEADING, 7.

VERDICT.

See CRIMINAL LAW, 7; MALICIOUS PROSECUTION, 3, 4; TRIAL, 11, 12.

VERIFICATION.

See PLEADING, 10.

VESSELS.

See SHIPPING.

VESTED RIGHTS.

See RECORDS.

VICE-PRINCIPAL.

See MASTER AND SERVANT, 3-8; RAILROADS, 23-25.

VIEWING PREMISES.

See TRIAL, 5, 6.

WAIVER.

See INSURANCE, 3, 4; PLEADING, 6.

WAREHOUSEMEN.

1. **WHEN PURCHASER, AND LIABLE FOR GOODS IN STORE.** — When corn is delivered to a warehouseman for storage, under an agreement that he may sell all or any part of it, and either return the corn on demand or pay for it at the market price when its return is demanded, and he sells so much of the corn in his warehouse that there is not enough remaining to replace all the corn so delivered to him at the time his warehouse and its contents are destroyed by fire, he is liable for the value of all corn so stored with him, because the transaction amounts to a sale, and not a bailment, although he has made advances on the grain so stored. *Olobs v. Shafroth*, 375.
2. **POWER TO EXCHANGE GRAIN IN STORE — LIABILITY FOR LOSS.** — A warehouseman as bailee of the grain of others, in store in his warehouse, has no power to transfer it or any part of it to another in exchange for the grain of the latter which such warehouseman has sold as his own. In case of the destruction of his warehouse and its contents by fire, he will be liable for the value of the grain thus sold by him. *Olobs v. Shafroth*, 374.

See **SALER**, 2.

WARRANT.

See **FALSE IMPRISONMENT**.

WARRANT OF ATTORNEY.

See **SURETYSHIP**, 1.

WARRANTY.

See **ESTATES; NEGOTIABLE INSTRUMENTS**, 6.

WATERS.

1. **SURFACE WATERS.** — IT IS NOT TRUE THAT A LAND-OWNER OR A MUNICIPAL CORPORATION may lawfully collect surface water into an artificial channel and pour it on another's land. *Patoka Township v. Hopkins*, 417.
2. **SURFACE WATERS.** — IF A PUBLIC CORPORATION by its acts makes necessary an outlet for the escape of water collected by it into artificial waterways, it must provide that outlet. Otherwise it is guilty of an actionable wrong. *Patoka Township v. Hopkins*, 417.
3. **HIGHWAYS — SURFACE WATERS FROM.** — If surface waters are collected in ditches at the sides of a public highway, and those ditches are then united and their waters thrown on the land of a private proprietor, rendering it wet and untillable, he is entitled to maintain an action against the township under whose authority the injury was inflicted, to enjoin its continuance. *Patoka Township v. Hopkins*, 417.
4. **RIPARIAN OWNER'S RIGHT TO WATER-POWER.** — A riparian owner on a navigable river has no right to the water-power either above or below low-water mark, and cannot recover for its loss from obstruction and diversion by an adjoining owner. *Williams v. Fulmer*, 767.
5. **RIPARIAN OWNER — DAMAGES FOR DIVERSION OF STREAM.** — A riparian owner on a navigable river is entitled to recover, as against another riparian owner, for a diversion of the stream by the latter from its natural channel. If the wrong is done without malice, he must restore the stream to its natural channel, or make compensation for the loss; but

- if malice is shown, exemplary damages may be recovered against him. *Williams v. Fulmer*, 767.
6. DIVERSION OF WATER without applying it to a beneficial use within a reasonable time is not an appropriation thereof, but is unconstitutional and unlawful. *Combs v. Agricultural Ditch Co.*, 275.
 7. WATERS CANNOT BE DIVERTED FOR PURPOSES OF SPECULATION, but only for purposes truly beneficial in their nature. *Combs v. Agricultural Ditch Co.*, 275.
 8. PRIOR APPROPRIATOR NOT ENTITLED TO EXCESSIVE DIVERSION. — A prior appropriation of water by a person for irrigation purposes does not entitle him to receive more water than is necessary for his actual use. An excessive diversion of water is not a diversion to a beneficial use. *Combs v. Agricultural Ditch Co.*, 275.
 9. RIGHTS OF PRIOR APPROPRIATOR AGAINST DIVERSION — JOINDER OF PARTIES. — A party who is entitled, by right of prior appropriation, to the use of the water from a natural stream is entitled to have such priority protected against the acts of junior appropriators to his injury, whether such acts are joint or several, and for that purpose he is entitled, if necessary, to join them all as defendants in one action. *Saint Guerrerio*, 320.
 10. RIGHTS OF PRIOR APPROPRIATOR AGAINST DIVERSION. — A party entitled to the prior right to use the water of a stream cannot identify certain specific water as his while running in the stream, unless he can show that he is entitled to all of such water. So long as he is able to secure the full amount of water to which he is entitled, he cannot complain that some other person, higher up the stream, is diverting its waters. *Saint v. Guerrerio*, 320.
 11. RIGHTS TO, HOW DETERMINED. — Mathematical exactness in measuring the flow of water is impracticable, and cannot be attained; but a reasonable approximation to substantial accuracy should be aimed at in determining controversies relating to water supply. *Combs v. Agricultural Ditch Co.*, 275.
 12. RIGHTS OF PRIOR APPROPRIATORS AS AGAINST DITCH COMPANY. — A company may organize for the purpose of constructing an irrigation ditch and divert the unappropriated water of a natural stream, either by or without incorporation; but neither the company nor any stockholder therein can thus withhold the water from beneficial use, nor reserve it for future use by junior appropriators, to the prejudice of prior appropriators, nor to the exclusion of those who, in the mean time, undertake, in good faith, to make a valid appropriation thereof. *Combs v. Agricultural Ditch Co.*, 275.
 13. APPROPRIATION — RIGHT OF WAY. — In an action involving a contest between water appropriators as to priority of right to the use of water, the court may determine who is entitled to a right of way for the carriage of water through a ditch already constructed, although the action is not brought to condemn a right of way under the act of eminent domain. *Saint v. Guerrerio*, 320.
 14. RIGHTS OF CONSUMERS. — A ditch company carrying water for general purposes of irrigation cannot arbitrarily refuse to supply water to an actual and *bona fide* consumer making reasonable application, and offering proper compensation. *Combs v. Agricultural Ditch Co.*, 275.
 15. CONSUMER'S RIGHT CANNOT BE REGULATED BY WATER COMPANY. — The right of individual consumers, upon tender of the carriage fee, to

water diverted by an irrigation company, and not already applied to a beneficial use, can no more be evaded or qualified by a regulation of the company compelling the purchase of stock as a condition precedent to use, than it can by a regulation fixing a sum in excess of the price charged for carriage to be thus paid for the use of water. *Combs v. Agricultural Ditch Co.*, 275.

16. **OWNERSHIP OF STOCK IN IRRIGATION COMPANY NOT APPROPRIATION.** — Priority of appropriation of water cannot be secured by the mere acquisition of stock in an irrigation company without applying the water to a beneficial use. The life of a prior right to water is actual use, and the owner of irrigation stock cannot carry prior rights to the use of water in his pocket for an indefinite and unreasonable time, and thereby prevent others from acquiring a *bona fide* priority by actual use. *Combs v. Agricultural Ditch Co.*, 275.
17. **OWNERSHIP OF WATER STOCK, WHEN GIVES PRIOR RIGHT.** — A stockholder in an irrigation company who makes an actual application of water from the company's ditch to a beneficial use may, by means of such use, acquire a prior right thereto; but his title to the stock without such use gives him no title to the priority. He may transfer his stock to any one, but he can only transfer his priority to one who will and does continue to so use the water. *Combs v. Agricultural Ditch Co.*, 275.
18. **RIGHTS OF DITCH-OWNERS TO.** — Those who construct ditches and divert water for general purposes of irrigation must, within a reasonable time, apply the water to a beneficial use, or upon proper application, and for proper consideration, they must dispose of it to those who are ready to make a beneficial use of it. *Combs v. Agricultural Ditch Co.*, 275.
19. **RIGHTS OF DITCH-OWNERS TO.** — Those who, by labor or the payment of money, actually construct an irrigation ditch may thereby acquire a prior right to the water diverted therein, provided they apply such water to some beneficial use, within a reasonable time after diversion; but they cannot postpone the exercise of such right for an unreasonable time, so as to prevent others from acquiring a right to the water; nor can they thus acquire a right to dispose of the water to the prejudice of prior appropriators. *Combs v. Agricultural Ditch Co.*, 275.

See MANDAMUS, 1; REAL PROPERTY, 4.

WHARVES.

EMINENT DOMAIN — PUBLIC DUTY TO PROVIDE FOR NECESSITIES OF COMMERCE — PUBLIC USE. — To minister to the necessities of commerce by providing suitable places in a seaport, where ships can be loaded and unloaded, with all proper facilities, is a public duty owing by the state, and, through it, by the municipality which governs and controls the port, and the necessities of the business are the only standard by which to judge of the extent of this duty. If a permanent pier and an exclusive right to its use be a necessity of large steamship lines, without which business cannot be properly transacted, the duty rests upon the state or the municipality to furnish such accommodations, or to permit the steamship companies to obtain them from private owners; and when the state has imposed upon the municipality the performance of this duty, all appropriate acts done by it in such performance are for a public purpose. Lands needed by a municipality bound to perform such a duty for the construction of piers and wharves are therefore required for a public use, and may be taken in the exercise of the right of eminent

domain, although some portion of them may thereafter be, in the discretion of the city, divided off and placed in the exclusive possession of a lessee, for the sole purpose of using it in the transaction of the necessary business connected with the loading and unloading of passengers and cargoes of ships and steamers. *In re Mayor of New York etc.*, 825.

WILLS.

1. **UNDUE INFLUENCE.** — CIRCUMSTANCES RELIED UPON TO PROVE UNDUE INFLUENCE must be such as, taken together, point unmistakably to the fact that the mind of the testator was subjected to that of some other person, so that his will is that of the latter, and not of the former. *In re Hess's Will*, 665.
2. **UNDUE INFLUENCE.** — While evidence of declarations of a testator, made subsequent to the execution of his will, may be received for the purpose of showing the extent and effect of the undue influence claimed to have been exercised over him, yet if the evidence, independent and exclusive of his declarations, does not satisfy the jury that undue influence was used in procuring the will, they must answer the question of undue influence in the negative. The evidence of undue influence must be other than that which proceeds from the testator's own mouth after the will was made. *In re Hess's Will*, 665.
3. **UNDUE INFLUENCE IS NOT ESTABLISHED** by the fact that there were motive and opportunity. It must further appear that the influence was exercised, and that its effect was to destroy the free agency of the testator, and to control the disposition of his property under the will. *In re Hess's Will*, 665.
4. **UNDUE INFLUENCE.** — THE INFLUENCES RESULTING IN FAVOR OF PERSONS WHO ARE NEAREST the testator in respect and affection, or by reason of intimate social or domestic relations, cannot be regarded as undue. *In re Hess's Will*, 665.
5. **UNDUE INFLUENCE CANNOT BE PRESUMED** from the mere fact that the provisions of the will are much more favorable to some of the beneficiaries than to others. *In re Hess's Will*, 665.
6. **BURDEN OF PROVING FRAUD OR UNDUE INFLUENCE** rests upon the contestants of the will. *In re Hess's Will*, 665.
7. **BURDEN OF PROOF.** — IF A TESTATOR, AFTER BEING ADJUDGED MENTALLY UNSOUND and placed under guardianship, executes a will, the burden is upon those who seek to uphold it to show by clear and satisfactory evidence that at the time of its execution he had the requisite degree of mental capacity. *Harrison v. Bishop*, 422.
8. **WILLS MADE BY PERSONS UNDER GUARDIANSHIP.** — One who has been adjudged to be of unsound mind and placed under guardianship is not necessarily incompetent to make a will, though such adjudication has never been set aside. *Harrison v. Bishop*, 422.
9. **CAPACITY TO MAKE.** — One's mental powers may be so far impaired as to incapacitate him from the active conduct of his estate, and to justify the appointment of a guardian for that purpose, and yet have such capacity as will enable him to direct a just and fair disposition of his property by will. *Harrison v. Bishop*, 422.
20. **CONSTRUCTION OF STATUTE.** — While the language of the Texas statute prescribing the requisites to a will is affirmative, it as fully denies testamentary effect to parol declarations as it would if it expressly declared

that no testamentary disposition of property should be made in manner other than that prescribed. *Heidenheimer v. Bauman*, 29.

See BEQUESTS; DESCENT; DEVISE; EVIDENCE, 1; TRUSTS, 2-4.

WITNESSES.

1. MASTER AND SERVANT — NEGLIGENCE TOWARD MINOR EMPLOYEES — EVIDENCE. — In an action by a minor employee to recover for personal injury, alleged to have been caused by the negligence of the master, witnesses who show a practical and actual knowledge as to what was necessary to be done by plaintiff in the performance of his services may testify that, in their opinion, owing to the size and strength of the plaintiff, it was absolutely necessary for him to perform the work in the manner in which he was performing it at the time of the accident, and thus relieve him from the charge of contributory negligence. *Keller v. Schenck*, 777.
2. VALUE OF MERCHANDISE INSURED, TESTIMONY OF MERCHANTS ADMITTED TO PROVE. — Merchants engaged in different lines of business, who saw a stock of goods insured before its destruction by fire, may testify as to the value of such stock, although their testimony is not as satisfactory as might be desired. *Graves v. Merchants' etc. Ins. Co.*, 507.
3. STREETS — OCCUPATION OF, BY RAILROAD. — EXPERT EVIDENCE is not necessary to determine the value of city property as affected by the occupation of a street by a railroad. All persons familiar with the property, who have formed an opinion, are competent to testify as to its value. *Jones v. Erie etc. R. R. Co.*, 722.

See TRIAL, 4, 8.

WORDS AND PHRASES.

See DEFINITIONS.

WRIT OF ERROR.

See JUDGMENTS, 12, 13.



